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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
*Petitioner,*

v.

ALLAN BAKKE,
*Respondent.*

ON CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

# BRIEF OF AMICI CURIAE

FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY AND THE MID-AMERICA LEGAL FOUNDATION

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF AMICI CURIAE | 1 |
| QUESTION PRESENTED | 5 |
| STATEMENT OF THE CASE | 5 |
| INTRODUCTION | 5 |
| SUMMARY OF ARGUMENT | 17 |
| ARGUMENT | |
| POINT ONE: EVEN IF IT WERE LEGAL, REVERSE DISCRIMINATION WOULD BE AN ILLUSORY REMEDY, AN UNSOUND POLICY AND GROSSLY UNJUST TO ALL AMERICANS | 19 |
| A. Bakke *Is* Indeed a Victim of Discrimination | 19 |
| B. *Anyone* Can Become a Victim of Reverse Discrimination | 23 |
| C. Reverse Discrimination Stigmatizes Its "Beneficiaries," Confirming Rather Than Repudiating Derogatory Stereotypes, And Inflicting Serious Harm on All Members of the "Benefitted" Minority Groups | 27 |
| D. Evidence Indicates that Preferential Admissions Leads to Lowered Professional Standards | 31 |
| E. There are Alternatives to Preferential Admissions That Will Accommodate Disadvantaged Applicants of All Groups | 37 |
| F. Petitioners Fail to Grasp the True Meaning of Merit and Why It Should Be Preserved | 42 |
| G. Obtaining "Diversity" in a Student Body Does Not Justify Reverse Discrimination | 47 |
| H. The Argument that Minority Professionals Should and Will "Return to the Ghetto" Is Specious and Misleading | 50 |
| I. Reverse Discrimination is Decidedly Not a Means of Improving Minorities' Health Status | 54 |

PAGE

J. Even Now, Reverse Discrimination is Polarizing and Balkanizing American Society ..... 58

K. Race is Not a "Bona Fide Occupational Qualification" for Professionals ..... 66

L. Professional Schools' Minority Enrollment "Goals" are Really Quotas ..... 75

M. Reverse Discrimination Requires Intrusive Governmental Assigning of Racial and Ethnic Labels ..... 78

N. Reverse Discrimination is a Racist Concept ..... 81

O. Reverse Discrimination is Morally Wrong ..... 83

POINT TWO: REVERSE DISCRIMINATION IS NO MORE PERMISSIBLE THAN TRADITIONAL DISCRIMINATION; IT IS PATENTLY OFFENSIVE TO THE CONSTITUTION, RELEVANT STATUTES AND WEIGHT OF JUDICIAL AUTHORITY ..... 88

A. Petitioners' Line of Argument on the Equal Protection Question is Fundamentally Misleading and Incorrect ..... 88

B. The Authorities on the Equal Protection Aspects of Reverse Discrimination—Including Many Cited by Petitioners—Support Respondent's Position ..... 94

C. Petitioners' Quota System Is Not a "Remedial Classification" ..... 100

D. Reverse Discrimination's Victims Cannot Take Political Counteraction ..... 104

E. Petitioners' Discriminatory Policies Are Illegal Under 42 USC § 1981 and Title VI of the Civil Rights Act of 1964 ..... 107

CONCLUSION ..... 109

APPENDICES ..... 110



## TABLE OF AUTHORITIES

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PAGE

Anderson v. San Francisco Unified School District, 357 F.Supp. 248 (N.D. Cal. 1972) ..... 94

Arlington Heights v. Metro. Housing Corp., ___ U.S. ___, 50 L.Ed. 2d 450 (1977) ..... 99

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PAGE

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PAGE

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PAGE

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**CONSTITUTIONAL AND STATUTORY PROVISIONS**

Fourteenth Amendment, U.S. Constitution ..... passim
20 USC § 1232i(c) ..... 16,108
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# BRIEF OF AMICI CURIAE ON THE MERITS

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FOR THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY AND
THE MID-AMERICA LEGAL FOUNDATION

## INTEREST OF THE AMICI CURIAE

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to federal and state legislation relating to civil rights and to fair educational practices, and to the equal protection provisions of the United States Constitution. CANI is an offshoot from University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters toward the re-establishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxy.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and Integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country.

It has brought together professionals from every discipline, women and men, blacks and whites, Christians, Jews and myriad denominations, renowned academics with many years of tenure and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Sub-Committee, including:

Bruno Bettelheim
Joseph Bishop, Jr.
Daniel Boorstin
Edgar Borgatta
Paula Sutter Fichtner
Sidney Hook
Erich Isaac
Norma L. Newmark
Eugene Rostow
Paul Seabury



Nathan Glazer
Oscar Handlin
Gertrude Himmelfarb
Miro Todorovich
L. Pearce Williams
Cyril Zebot

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-called reverse discrimination against qualified applicants for academic positions in university admissions and employment. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. This material was then used subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance Programs, the Secretary of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare and the officials of the Executive Office of the President. Representatives of CANI have testified at congressional hearings and at those held by such agencies as the Equal Employment Opportunity Commission and the United States Commission on Civil Rights. Representations have also been made to various regional units of HEW's Office for Civil Rights, and to local university administrations. Factual materials have also been put at the disposal of interested individual members of Congress. Furthermore, the Committee seeks to help members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert quotas for members of selected racial or ethnic groups, or women, in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements have led them to believe that they would be given the opportunity to acquire further skill or knowledge,

or to use their scholarly abilities, found themselves discriminated against for no other reason than their race, ethnicity or sex.

The question of the constitutionality of the establishment of racial or sex quotas, or of discriminatory preferences for members of selected groups without the establishment of a quota, is clearly of vital importance to members of the Committee.

Deeply concerned by what it has viewed as an erosion of constitutionally guaranteed individual rights—including the right to be free from discrimination based on race, ethnicity and sex—CANI has filed briefs as amicus curiae in a number of significant cases including *Cramer* v. *Virginia Commonwealth University, DiLeo* v. *Regents of the University of Colorado,* et al., and *State of Wisconsin (Department of Administration)*, et al., v. *Department of Industry, Labor and Human Relations, John T. Patzer, and Madison Building Trades Council.* In each instance, CANI has, as here, taken the position that all forms of discrimination are Constitutionally impermissible.

The Mid-America Legal Foundation (MALF) is organized to engage in nonpartisan legal research, study and analysis for the benefit of the general public, as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation and to assist other organizations in providing legal representation on matters of public interest at all levels of the judicial process.

These Amici sought and obtained leave to file a Brief Amicus in support of the Writ of Certiorari which was granted by this Court. The Writ having been granted, these Amici now seek leave to file this Brief on the merits, and believe that it is in the public interest to do so.

CANI and MALF as Amici believe that there is ultimately but one substantive issue present—though it may be possessed of numerous sub-issues—which, because of its seminal nature,



necessarily requires an exhaustive examination by the Court. It is sincerely hoped that this Brief will be of assistance.

CANI and MALF believe that the sole substantive issue is the question presented.

## QUESTION PRESENTED

**Does the Equal Protection Clause, held to protect blacks from discrimination in state university admissions, also protect whites?**

## STATEMENT OF THE CASE

CANI and MALF adopt the counterstatement of the case set forth in Respondent's brief in opposition to the Petition for Certiorari at pp. 2-20.

## INTRODUCTION

This case involves a blatant and flagrant instance of race discrimination in a state university's admissions practices. There is no question of evidentiary sufficiency; indeed, the perpetrator admits its actions. However, the act was committed, and this litigation had to be brought, because of an element in the discrimination involved which—according to the perpetrator—transforms what would otherwise be a clear-cut breach of the Constitution into a deed not only permissible but indeed praiseworthy.

The alleged "saving grace" in the discrimination by Petitioners' medical school against Bakke supposedly exists because the discriminatory act was committed (1) against a white person rather than against a racial minority group member, and (2) in order to help assure that additional racial minority persons would be admitted to the medical school and ultimately enter the practice of medicine.

With all due allowance for the medical school's praiseworthy desire to help minority group members, these Amici believe that the medical school's position totally distorts and perverts the valuable and necessary concept of affirmative action (a concept which these Amici firmly support) and, unless decisively rejected by this Court, will make a farce and a mockery out of the Fourteenth Amendment's Equal Protection Clause.

It would seem that Petitioners' arguments in essence are rooted in the notion that there must be a double standard under the Equal Protection Clause.

It is axiomatic that blacks and other racial minorities cannot be discriminated against because of their race. But the University of California says that whites *can* be discriminated against because of their race. [1]

It is bedrock Constitutional law that a black applicant cannot be consigned by a state to a "separate but equal" state-run medical school exclusively for blacks and other minorities.[2] But the University of California is arguing that an even more vicious act can be visited with impunity upon a white applicant. It would be bad enough if such an applicant were shunted into a "separate but equal" medical school. But the University does not propose to do this. Rather, it not only proposes—it actually has—totally excluded Bakke from admission to the Davis Medical School and thus completely shut the door in his face.

If the Constitution forbids a state to segregate its black applicants from state-run medical schools, does it permit a state

[1] Petitioners seem very concerned about judicial interference in affairs best left to educators, as stressed in their Brief at 13, 38 and 76. Some Amici supporting them, such as the American Bar Association, agree, *e.g.*, A.B.A. Brief Amicus, 8. But surely none of these entities would complain about judges stepping in when an educational institution discriminates against *minorities*. It is only *non*-minorities who should not be protected by the courts when professors, deans and boards of regents discriminate on racial grounds, evidently.

[2] *Sweatt* v. *Painter*, 339 U.S. 629 (1950).



to deny admission altogether to white students on racial grounds, while letting in *far less-qualified* minority applicants? Does the Equal Protection Clause mean that some persons, who belong to groups which have historically been discriminated against, are now to be more equal than members of other groups? We think not.

The minorities who benefit from preferential treatment are commonly termed "disadvantaged." While not all such beneficiaries come from deprived backgrounds, all of them may indeed be said to be disadvantaged in that they belong to groups whose members are still mistreated by some persons out of prejudice and bigotry, even though they also often receive benefits and preferences in employment and university admissions and financial aid. But none of them suffers from the particular disadvantage with which they were formerly saddled when discriminatory acts against them were not considered illegal. Now, Petitioners would argue, only non-minorities have to endure that.

Before the adoption of the post-Civil War Constitutional amendments, America's blacks enjoyed little in the way of civil rights. After the Fourteenth Amendment was interpreted, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), as allowing a state to provide "separate but equal" treatment for blacks, members of that group were still under a considerable disadvantage, although they did not have the problems that a Bakke faces today. For him, no "separate but equal" medical school. For Bakke, says the University of California, it need not provide a medical education at all, even though he is far better qualified than most if not all of the preferentially admitted minority applicants.

Thus, Bakke's plight is far more similar to that of the blacks *before* the advent of the Fourteenth Amendment than it is to the still-dreadful situation blacks faced between 1896 and the historic abolition of the *Plessy* rule in *Brown* v. *Board of*

*Education of Topeka,* 347 U.S. 483 (1954). Clearly, the University is really trying to make the Bakkes of this country into "constitutional non-persons."

In order for Petitioners to prevail in this case, it is obviously necessary for them to trumpet forth the notion that various kinds of flagrant discrimination which obviously cannot be visited upon blacks or Hispanics can, with complete impunity, be inflicted upon members of other and non-racial minority groups, and upon whites in general. That proposition bodes ill indeed for America's future.[3]

For such racial minorities as blacks and Chicanos, certainly, the right to be free from discrimination in a state-administered selective process is now a fixed, settled, immutable fact of legal life in this country. Abolishing that right is not a proper subject for discussion; to seriously discuss such a

[3] One of the finest statements on why quotas are wrong was made by President John H. Bunzel of California State University, San Jose. His main points, which apply equally to all reverse discrimination, whether or not implemented by quotas, may be summarized as follows:

1. Although allegedly intended to eradicate discrimination, quotas are really a new form of discrimination.

2. The use of bad means to achieve supposedly good ends is self-defeating and destructive.

3. By leading people to believe that discrimination can be fought by relatively mechanical methods, quotas will reduce the incentive for genuine reform.

4. By destroying the principle that merit should be supreme, quotas obliterate the only possible objective legal standard on which a finding of discrimination can be based.

5. Quotas destroy the common set of rules which holds America together by giving an unfair advantage to some—solely on the basis of group identity—at the expense of other persons who have done no wrong.

6. Quotas intensify polarization and antagonism among groups in our society. Victims will inevitably come to think of "beneficiaries" as enemies.

7. Quotas require heavy-handed governmental classifications of our private and personal characteristics, and, by the intrusion of the state, thrust considerations of these traits into decision-making processes where such matters as race, sex and ethnicity should be irrelevant.

J. Bunzel, "The Quota Mentality," *Freedom at Issue* (Nov.—Dec. 1973).



step would be considered the utmost in bad taste as well as a pointless waste of time. Aside from the racial animosity inherent in making such a suggestion, doing so would obviously constitute the proverbial "beating a dead horse." These Amici firmly believe that other minorities, and whites in general, must possess, not a greater right in this respect than do blacks, nor a lesser right, but the *same* right. It is for that reason that we respectfully request this Court to clarify the reasoning of the court below so as to make unmistakably clear the absolute impermissibility of discrimination against members of any group in situations such as the case at bar. The decision below would make it appear as if such discrimination could be permitted if a state made a "sufficiently" strong showing of "compelling state interest." We believe that this door must not be left open to those who have shown themselves all too eager to perpetrate reverse discrimination in the past. The issue is more fully addressed in Part II, *infra.*

This double standard, both explicit and implicit, pervades Petitioners' Brief. They have no hesitancy about raising a "compelling state interest" argument to justify their cause, even though it would be unthinkable to do so to justify discrimination *against* blacks and the other minorities aided by the program under review here.[4]

[4] We would contend that there are two different types of invidious discrimination based on group identification. First there is the "traditional" variety which can be committed against anyone, even whites or males, simply for the reason that the perpetrator dislikes, is prejudiced against, or wants to harm members of that particular group. Reverse discrimination, the second variety, similarly can be committed against anyone, *even racial minorities and women* (as we will document in Point I-B). Reverse discrimination is that type which is supposedly "justified" for such reasons as "making up" for prior discrimination, considerations of "affirmative action," or on grounds of a false bona fide occupational qualification (such as the incorrect allegation that black or Hispanic patients need black or Hispanic physicians).

These Amici feel it necessary to use the phrase "reverse discrimination" not because it is the "reverse" of discrimination (it is of course one species of discrimination itself), but because it is generally agreed that discrimination (without a qualifying adjective) is evil, whereas it is not agreed by all that reverse discrimination is evil. This particular phrase itself must perforce be used for want of a generally accepted better appellation. (It is for these

Ironically, however, since *other* minorities (as we will document), *including racial minorities,* have been and continue to be actual victims of reverse discrimination, Petitioners—perhaps unknowingly—are not only arguing that the shield of the "strict scrutiny" test should be denied to Bakke and other whites, but are also, in effect, urging that it should not protect even racial minorities such as Asians, when *they* are the

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reasons of semantics and clarity that Professor Nathan Glazer has coined the phrase "affirmative discrimination," which has not yet, however, entered the popular vocabulary.)

These Amici feel that the phrase "affirmative action" is rather ambiguous. (For example, many commentators use the words "affirmative action" to *mean* "reverse discrimination." We do not subscribe to that usage, preferring to use the phrase only to indicate the kinds of proper and legitimate programs of which we approve. We recognize, however, that many others, on both sides of the issue, do not so restrict the term.) Our own definition of affirmative action comprises those measures that aid members of some groups without impinging on members of other groups, and that are equally available to all persons on the basis of need regardless of the group identification of such persons. This definition of course does not preclude those legitimate efforts oriented toward a particular group, such as advertising job openings in newspapers with a predominantly black readership, if members of other groups are not excluded from notification, consideration, and possible eventual selection.

Although the word "minority" in this case has been used to refer to the selected group or cluster of racial and ethnic minorities chosen in the particular preferential program at the Davis medical school, precision would call for including other racial groups, as well as religious and national origin minority groups, within the ambit of that term. It would be more correct semantically to put the word minority in quotation marks when it is used in the restricted sense adopted by Petitioners. We will follow the conventional style and not do so, but it should be remembered that Petitioners really are discussing an *arbitrarily selected* congeries of groups when they use that term.

Also, the word "quota" is not a synonym for "reverse discrimination." Quotas are but one way of implementing reverse discrimination. A quota is a specific minimum or maximum numerical target "body count" of persons from a particular group to be chosen for employment, admission to a university, receipt of scholarships or in some other selective process. The achievement of this figure is sought as an end in itself. Under true conditions of equal opportunity, decision-makers cannot possibly know in advance how many persons of a given group will be selected. But if such a number is decided upon in advance and is then striven for, a quota system is in operation. The flexibility of the target figure is irrelevant, although it might be assumed that a relatively rigid target is somewhat more objectionable than a more loosely defined one. Both, however, are obviously discriminatory and, when they involve state action, contravene the Equal Protection Clause.



victims of discrimination perpetrated in the name of affirmative action. Under Petitioners' views, the Asian victims of the reverse discrimination in *Hupart* v. *Board of Higher Education,* 420 F.Supp. 1087, 1103 (S.D.N.Y. 1976)—a case dealing with admission to a combined college-medical school program—would not be able to invoke the strict scrutiny test (and of course should not prevail under the intermediate or rational basis tests either). (For additional examples of reverse discrimination against minorities, see Point I-B, *infra.*)

All of us, minority or majority, must be aware that once the quota principle is accepted, there is no stopping point, quantitative or qualitative. Consider, for example, that while the Davis Medical School minority quota may be only 16%, that of the same University's School of Law at Berkeley (Boalt Hall) was 25% until 1975, and is now 22½%. Law School Deans' Brief on Certiorari, 25. And as far back as six years ago, the faculty of the School of Social Work at Fresno State College in California (now California State University, Fresno), on November 22, 1971, approved a resolution that it "should have as a goal for 1972-73 an incoming graduate class consisting of one-third black, one-third Chicano, one-tenth other minorities, and the remainder, Caucasian students." Under these minority quotas, which totaled about 77%, only about 23% of the incoming students were to be white. B.R. Epstein & A. Forster, *Preferential Treatment and Quotas* 9 (Anti-Defamation League of B'nai B'rith pamphlet, 1974).

Indeed, it appears that, if reverse discrimination is upheld by the Court, any institution not content (as was Fresno State's School of Social Work) to make *whites* the true minority group in its enrollment could simply *eliminate them altogether,* thus opening up the maximum number of seats to whatever minority groups it wished, in whatever ratios for each group it thought best. Such exclusion of whites might be for one year or twenty, or until such minorities, in the school's unreviewable judgment,

no longer needed this kind of aid.[5] Nor would the excluded students be whites only. Again taking a cue from the Fresno State approach, a school might choose to eliminate one or more relatively privileged minority groups from its rolls altogether, thus creating even more room for members of worse-off minorities. Fresno State has actually pointed the way, since Asians were consigned—along with Native Americans—to the 10% sub-quota of the class reserved for "other minorities." By shutting them out entirely, denying them even the fractional share of a sub-quota that they originally had, additional space could be gained for minorities "more disadvantaged" (in the school's eyes).

It might be argued that such an eventuality is unlikely, but we document in Point I-B actual instances of reverse discrimination against the very groups that usually benefit from it.

The double standard adopted by Petitioners also explains why their Brief so casually dismisses, at 56-7, Bakke's blasted hopes of a medical career, and why, at 43 n.53, it calls their scheme an "experiment" that should be allowed to continue. But what if blacks, or Chicanos, or other minorities classified by race were the victims, rather than Bakke and those similarly situated?

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[5] In the case of John Patzer, a white man denied a maintenance job at the University of Wisconsin, the government officials involved issued a chilling numerical prognostication of the university's intent to continue its policies of reverse discrimination until the percentages of women and minorities employed in maintenance jobs at the particular campus was equal to the percentages of those groups in the local work force:

> "Testimony showed that *no more white males would be recruited for 44 years* for the University Maintenance Department until the percentage of women employees in the work force equal [sic] the same percentage as women bore to the available working force in the community."
>
> *State Dept. of Administration* v. *Dept. of Industry, Labor & Human Relations*, 12 FEP Cases 1447, 1448, 11 EPD ¶ 10,938 (Wis. Cir. Ct., Dane County 1976) (emphasis added).

The striking down of this quota by the state human rights agency, enforced and affirmed in the quoted decision, has now been upheld by a unanimous Wisconsin Supreme Court. ____ Wis. 2d ____ 252 N.W.2d 353 (1977).



Petitioners have taken the wrong road. Civil rights were obtained only when whites joined and worked in brotherhood with minority groups, enduring much suffering along the road to civil rights progress. Now Petitioners have chosen a course of action that sets minorities and non-minorities against each other, creating resentment and bitterness, as can be seen even from the plethora of briefs amicus in the instant case.

Repeatedly, Petitioners and the Amici supporting them characterize the program under review here as designed to insure the *in*clusion of minority group members in the medical profession. That, of course, is not the issue. Rather, this case hinges on whether a person can be *ex*cluded from medical school, and thus from the profession, solely on account of his race.

Because of the extremely appealing nature of the idea of including more blacks and other minorities in medicine, Petitioners stress this point and slough over the excluding of persons such as Respondent. They attempt to build their entire case around a false dichotomy, trying desperately to persuade the Court that it must choose between upholding the challenged program and inflicting grievous harm on the nation's minority population. That proposition is wholly without merit.

Indeed, as we will demonstrate more fully in Part I, *infra*, the challenged program is actually *harmful* to minorities, and its abolition is necessary for their sake as well as for the sake of the countless more obvious victims of reverse discrimination in the United States today and in the future.

When discrimination against blacks was sanctioned by the law of the land, it was often said that such discrimination was really for the good of society. Some, for example, even asserted that the Bible and God's eternal plan provided for the maintenance of blacks in a subjugated status; civil rights proponents were thus resisting the Divine Will. Others contented themselves with explaining that there were scientific reasons why blacks were inferior and should never have rights equal to the white man's.

Nowadays, similarly, there is no shortage of rationalizations for policies of *reverse* discrimination. We are told that they help the entire society, whites as well as blacks, and correct historical wrongs. (The specific ways in which they help a Bakke remain unclear.) But the primacy of the Fourteenth Amendment right to be free from discrimination—which the Supreme Court has consistently held to be an individually- and personally- possessed right, not a right belonging to any racial or other group as a whole—is simply tossed aside and forgotten by the apologists of reverse discrimination. And so are its innocent victims, who lose their chances for developing their talents, engaging in a meaningful career, and enriching society.

Because of the widespread imposition of preferential policies in university admissions and in public and private employment, it can be said that *non-minority persons* (and also *men*, whenever women are preferentially hired and promoted, or admitted to institutions of higher learning), are disadvantaged, along with members of the historically discriminated-against groups who may be or are still subjected to the traditional variety of discrimination. At the very least, however, the latter victims are able to go to civil rights agencies and courts, to obtain redress. Those who suffer from reverse discrimination, though, face an uphill battle because the discrimination itself, even if conceded to have taken place, is not avowedly illegal.

How long must this intolerable situation continue? Certainly it poisons the relationship among the races and the ethnic groups that comprise our diverse population, and between the sexes. The recent Gallup poll on the subject shows that better than 4 out of 5 Americans oppose reverse discrimination. Among non-white respondents to the poll, sixty-four percent rejected such preferences. New York *Times*, May 1, 1977, 33.[6]

[6] This statistic contradicts empirically the rather silly argument, made by some, that official reverse discrimination is somehow constitutional because it represents an attempt by a majority to discriminate against itself. But even were the figures reversed, what happens in professional school admissions is not the action of a, or the, "majority." It reflects, rather, the decisions of certain persons in positions of power in the particular school's admissions process, and in organizations such as the Association of American Medical Colleges, the Association of American Law Schools, the Council on Social Work Education, etc. This is all so obvious that it should not need to be said, but Petitioners' Brief, at 72-3, alleges that Bakke and his fellow members of the majority "have a life-or-death control over special-admissions programs." *Id.*, 73. Actually, of course, it was Petitioners who had a life-or-death control over Bakke's chance to be evaluated without racial discrimination—and it is now a matter of public record which option they took. We refute these specific arguments more fully in Point II-D.



While the proponents of reverse discrimination are in many cases trying to use it (or, at least, claim the intention of doing so) as a mechanism for solving serious social problems, other methods exist to cope with those problems, and additional solutions can also be developed—although perhaps some of these solutions will call for certain sacrifices *from the institutions* which have been engaging in reverse discrimination, rather than from innocent third parties.[7] We submit that many institutional decision-makers are well aware of this fact—which is why they choose to resolve their conflict of interest by discriminating against non-minority persons and males. Often, reverse discrimination may be motivated simply by crass self-interest on the part of certain holders of institutional power who believe that they can "get away with" blatant disregard of human rights in order to raise their "body count" of particular groups and thus improve their public relations posture.

It must be remembered that the medical school here is not defending some sort of program requiring sacrifices by the school itself in the interest of minorities, such as the establishment of a clinic, run by the school, in a rural county having no physicians of its own, as was done by the University of

[7] The President of the Rockefeller Foundation (and former executive director of the renowned Massachusetts General Hospital), Dr. John H. Knowles, points out that the medical schools are not very interested in aggressive programs of disease prevention, or better patient education, preferring to concentrate on other matters. He explains how this attitude has a particularly negative impact on minority groups. J. H. Knowles, "The Responsibility of the Individual," 57, at 76 and 80 in Knowles (ed.), *Doing Better and Feeling Worse: Health in the United States* (1977) (also published as the Winter 1977 issue of *Daedalus*).

Florida College of Medicine at Gainesville. 231 *J.A.M.A.* 1011 (1975). Instead, institutions practicing reverse discrimination expect Respondent and countless others like him, to give up *their* careers in order to salve the *school's* collective conscience about what it is doing for minorities. That, we submit, is totally unacceptable, and a breach of the Constitution.

It is this very insistence that innocent individuals sacrifice their hopes and plans, while powerful administrators shirk their own responsibilities, that, we submit, lends an especially galling quality to the high-minded sentiments with which the proponents of reverse discrimination characteristically try to justify it. "The most odious of all oppressions are those which mask as justice." Jackson, J., *concurring, Krulewitch* v. *United States,* 336 U.S. 440, 458 (1949).

Now that Congress, as part of the Education Amendments of 1976, P.L. 94-482, has, in 20 USC 1232i(c), barred the Secretary of Health, Education, and Welfare from forcing racial quotas on colleges, universities, and professional schools as a condition for receiving Federal financial aid, the Court, it is hoped, can prevent schools from doing voluntarily what the Secretary could not make them do involuntarily.

Just as it is simply not permissible to try to solve a social or economic problem by some method that will discriminate against minorities (or women), and just as it is deemed disrespectable even to suggest such a course of action, *exactly the same rule* must govern with respect to alleged "solutions" for society's ills that discriminate against those classed as "non-minorities"—who, ironically, are often members of minority ethnic or religious groups themselves.

Indeed, in many cases, the ancestors of reverse discrimination's victims were not even in the United States at the time of the prior discrimination against blacks and other minorities which is used as the excuse for committing reverse discrimination today. Ironically, many of these young people, especially those whose forebears came over somewhat later



than the Mayflower arrivals, are themselves members of minority groups—although the perpetrators of the preferential admissions and employment schemes so in vogue nowadays doubtless do not think of persons such as Italo-Americans, Catholics, Polish-Americans, Jews, and other groups as being truly minorities (though numerically by definition they so qualify). Obviously, the preferential treatment in situations such as the instant case is reserved only for members of *selected* minority groups.

To conclude this Introduction, we must emphasize the heart of the problem: that reverse discrimination focuses on a person's group identification rather than on the individual, his unique talents and his inalienable rights. That, of course, is the basis of the very evils which it is supposedly meant to eliminate. Until we learn to look at human beings as individuals, we will never have any hope of eradicating discrimination.

We therefore respectfully call to this Court's attention the eloquent words of the United States Court of Appeals for the Third Circuit, which, in an employment discrimination case involving the Philadelphia Police Department, expressed a consideration which these Amici respectfully urge should govern in the instant case:

> "In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place."
> *Commonwealth of Pennsylvania* v. *O'Neill,* ____F.2d ____ 4 FEP Cases 1286, 1289-90, 5 EPD ¶ 7974 (3d Cir. 1972).

## SUMMARY OF ARGUMENT

These Amici contend that reverse discrimination—a variant of traditional discrimination—is not constitutionally permissible as it relegates traditional merit concepts of competition

and selection, in the *Bakke* context, to the accidents of skin color, race, ethnicity or gender, *none* of which allow free and open competition and which indeed, if they were used to exclude minorities, would be roundly condemned by Petitioners and their supporters.

Since this is truly a nation of minorities—the group characteristics shifting and flowing with the identifying criteria used—we are all potential victims of individual exclusion from that to which we may—by objective measurement, evaluation and choice—otherwise be entitled, be it admission to a medical school, employment, access to governmental services, or otherwise.

Reverse discrimination, while it may by its proponents be urged with the same praiseworthy intentions as was Prohibition, nevertheless like that errant social experiment is flawed by the greater long range harm than good of which it is capable.

These Amici, while not shocked, are appalled by the position taken by Petitioners and their supporters with respect to various arguments urged as supportive of a license to engage in blatant and outright discrimination against non-minorities. Race is not a bona fide occupational qualification, and there is no compelling state interest to exclude non-minorities on the basis of race. Regardless of the attempts made to belittle the contention that reverse discrimination stigmatizes its intended beneficiaries, it is irrefutably documented that this occurs, as well as the polarization of the races which comprise this nation's population.

Special admissions programs voluntarily established by state universities for their professional schools ineluctably lead to a reduction of professional standards of their graduates, and necessarily dilute the quality of professional services ultimately delivered by the graduates to the community. Contrary to the position of Petitioners, the compelling state interest is to avoid this evil, and its precursor, reverse discrimination.



## POINT ONE: EVEN IF IT WERE LEGAL, REVERSE DISCRIMINATION WOULD BE AN ILLUSORY REMEDY, AN UNSOUND POLICY AND GROSSLY UNJUST TO ALL AMERICANS

### A. Bakke *Is* Indeed A Victim Of Discrimination

The perpetrators of reverse discrimination make light of their victims' suffering and even have the temerity to deny that they *are* victims. For instance, Petitioners' Brief, at 72, alleges that "the injury to respondent is a mere isolated influence in his life" and will not make either him or others feel that he is "innately inferior." That is arrant nonsense. This "isolated instance" is merely costing him his whole career, as was eloquently stated in a letter to the New York *Times*:

> "One of the more noble concepts of a democratic society is that each shall be judged on worth, or effort, or merit, not because of race, or the color of one's eyes, or the shape of one's feet. If the Supreme Court should reject Allan Bakke's plea for admission to a medical school it would be solely because Bakke is the wrong race.
>
> Somewhere, if this approach is played to its final end, the action of the Supreme Court would mean that a single minority individual, not a minority race, would be granted admission to the school, while a single human being, Allan Bakke, not an abstract something called "white society," would be denied admission.
>
> If this occurs, who then shall speak for the human being known as Allan Bakke? Who shall mourn his shattered life and blocked goals? Where, then, is the justice?"
>
> I. Herbert Gordon, Letter to the Editor, New York *Times*, July 3, 1977, § 4, at 13.

Can anyone imagine even the most callous perpetrator of "traditional" discrimination against, say, women or blacks thus

attempting, in a brief filed in this Court, to trivialize the harm it had done? Obviously not, but then the issue could never arise now, inasmuch as "traditional" discrimination against those groups is irrevocably recognized as illegal. That, however, is not the case with the kind of discrimination committed against respondent, who, according to Petitioners, *is* "innately inferior" in the eyes of the law because he does not belong to one of the so-called protected groups.[8]

This startling conclusion—that whites are denied the protection of the Equal Protection Clause, let alone the benefits of the strict scrutiny test is supposedly justified by one of the several semantic games Petitioners play—their restrictive definition of the word "invidious," *Id.* at 72 and 73-4 n.72. They actually allege that the only kind of racial discrimination outlawed by that Clause is the type bottomed in notions that the victim's group is racially inferior, and that will arguably make the victim feel that he is a person of lower qualitative value solely because of his race. *Id.* at 71-2. This self-serving, twisted version of one rationale for some of the Court's decisions tries to transform a good and sound reason for protecting certain groups, such as blacks, into an excuse for allowing rampant, unchecked official discrimination against members of the other groups.[9]

[8] Petitioners' Brief, at 37 n.45, states that "the known availability of real opportunities for admission may be particularly important to the educational ambitions of young minority students." It would certainly seem to these Amici that the "known availability" of at least a fundamental fairness in the admissions process would be of vital importance to the educational ambitions of non-minority students. What could be more discouraging to a medical school applicant than to know that, after all the civil rights progress of the last century, his race will still be held against him, and that there is no hope of obtaining legal redress against this blatant discrimination? Indeed, even Petitioners admit that the present quota system at Davis dissuades some whites from applying at all. *Id.*, 52 n.60.

[9] Professor J. H. Ely rejects Petitioners' view that stigmatization of the victim is a prerequisite for equal protection coverage. Ely, "The Constitutionality of Reverse Racial Discrimination," 41 *U. Chi. L. Rev.* 723, 730 (1974).



In the light of the specific facts herein, it is difficult to understand the reasoning relied on in Petitioners' Brief at 56-7, which alleges that the injury to Bakke

> "is a diminished opportunity to obtain a benefit that he has not previously enjoyed; the state has not taken away from him a position already achieved, nor has it denied him an advancement to which, in the absence of a remedial scheme, he could otherwise show clear entitlement."

That is obviously a misstatement, because in fact the medical school has previously conceded that Bakke's credentials were so high, *and that even the "non-cognitive" aspects of his credentials*—which the medical school terms of such great importance—were also sufficiently high, Brief for Respondent in Opposition to Certiorari, 6-8, to have made it impossible for the medical school to prove that he would not have gotten in absent the reverse discrimination. Petitioners' Brief, 7-8.

In other words, but for the reverse discrimination, as far as one can tell, Bakke would have been admitted. Even a cursory glance at his scores compared to those of the specially admitted minority students shows that if he were judged by the same standards as were applied to them, his admission would have been a foregone conclusion. Of course, it must be noted that Bakke measured up quite well even among the regularly admitted students, as is graphically demonstrated by the chart in Brief for Respondent in Opposition to Certiorari, at 11.[10]

That same chart makes crystal-clear the huge gap between the formal credentials of the preferentially admitted minority applicants and those of Bakke. Coupled with his excellent interview scores, this evidence vitiates whatever scant additional force Petitioners' arguments might possess if Bakke had been

[10] Petitioners attack, in their Brief, "the conception of some that respondent is more deserving of admission to medical school than minorities because he tried so hard and wanted so much to attain such admission." *Id.* at 58 n.64. That is really setting up a "straw man." These Amici, and, we believe, all the other supporters of Respondent, are merely insisting that he deserves a fair chance to have his excellent credentials assessed in a non-discriminatory manner.

only slightly better qualified than the admitted minorities. He is certainly *not* one of the " 'borderline whites' " who, according to Petitioners' Brief, 56 n.62, are "incidental beneficiaries of past discrimination" and may thus legitimately be excluded. Actually, of course, it is doubtful that very many borderline whites are now admitted to medical schools, in view of the fierce competition that existed even before the advent of today's widespread quotas, Petitioners' Brief, 28 n.31, and, as the instant case shows all too clearly, an unknown number of *top-flight* white candidates are in fact denied admission by discriminatory schemes such as Petitioners', along with various well-qualified minority group members whose groups are not included in the quota constellations of certain schools to which they apply. (Examples of the latter would include Japanese- and Chinese-Americans in two of the three actual quota schemes set forth in Brief for Respondent in Opposition to Certiorari, 30 n.13.)

However, even "borderline" candidates of any race should not be subjected to racial discrimination. No American should have to endure that evil any longer. If they are to be rejected, let it be done on the merits, not on a racial basis.

In still another effort to negate or at least trivialize the harm done to respondent, Petitioners characterize the personal injury to him as no different

> "from the case of a family displaced from its home by an urban renewal project, or of an urban applicant whose chances for admission are reduced by an admissions policy aimed at increasing the number of doctors likely to practice in remote areas."
>
> Petitioners' Brief, 56.

Both of their analogies are flagrantly false. A family displaced from its home by an urban renewal project must not be discriminated against by reason of race, and such a family, if black, must of course receive the same kind of relocation aid



that would be given to white families. *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (2d Cir. 1968).

It would, of course, be unthinkable to suggest that the victims of such displacement be selected on racial grounds. But this, of course, is what the university has done to Bakke.

As for Petitioners' analogy to selection of applicants who appear oriented toward an eventual rural practice, that policy can and should be administered on a non-racial basis.

### B. *Anyone* Can Become a Victim of Reverse Discrimination

It must be emphasized that a widespread myth about reverse discrimination is untrue: contrary to popular belief, the direct victims of this phenomenon are *not* limited to the class of white males. In some cases, members of one group which has historically been a target for discrimination are discriminated against in the name of helping members of another such group. For example, a New York Court has upheld the New York City Commission on Human Rights' finding in favor of a black complainant who had been discriminated against because the local school board wanted to award the position in question—a deputy superintendency—to an Hispanic applicant. In *Re City Commission on Human Rights (Community School Board No. 4)*, No. 40523/75 (Supreme Court, N.Y. County, 1975); N.Y. *Post,* July 2, 1975, at 11.

Conversely, in the California state higher education system, several Mexican-Americans have a federal class action suit currently pending against a state-run college for favoring blacks over them in employment and educational programs. *Crofts* v. *Board of Governors of California County Colleges,* Civil No. 75-337 (N.D. Cal., filed Feb. 18, 1975); Los Angeles *Herald Examiner,* Feb. 20, 1975, at A-7. Plaintiffs therein, ironically, are represented by the Mexican-American Legal Defense Fund, which has also filed a Brief Amicus supporting the Regents in the instant case. Evidently the Fund—despite the pending suit—has no objection to discrimination favoring blacks if Mexican-Americans are preferred also.

Among the cases where women have made charges of reverse racial discrimination are E.E.O.C. Dec. No. 75-268, 10 FEP Cases 1502, CCH E.E.O.C. Dec. ¶6452 (1975) and *Silverman* v. *University of Colorado*, 541 P.2d 93, 99, 11FEP Cases 1462, 1466, *reversed*, 555 P.2d 1155 (Colo. 1976). On the other hand, a black man filed a charge with the Minnesota State Department of Human Rights, claiming that University of Minnesota officials had rejected him for a personnel position, which, they said, was reserved for female applicants only. B. R. Epstein & A. Forster, *Preferential Treatment & Quotas* 30 (Anti-Defamation League of B'nai B'rith pamphlet, 1974).[11]

This Brief Amicus, when referring to minorities and non-minorities, for the sake of convenience, uses those terms only in the sense that the Davis medical school did in its particular program. But it must be remembered that these are arbitrarily and capriciously selected minority groups, based on the medical school's opinions as to which groups should be favored. While a group such as Asian-Americans may be favored in one program, such as that under review in the instant case, it must be noted that even such a racial minority group, despite all the

[11] As an example of the sometimes questionable motivations for reverse discrimination, we respectfully draw the Court's attention to *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673 (E.D. Va. 1976). There, the sociology department of a state-run institution of higher education decided to discriminate in favor of women applicants for two vacant faculty posts, and did so in the most convenient way possible—by simply refusing to look at any applications from men. In this way, it must be noted, the university managed to dispose of any need to consider applications from black male candidates as well as white males. Furthermore, it put itself in a position where white women, rather than black ones, could be chosen for the positions in question and, since the school's announced goal was to hire women, the race of the women hired would not be questioned.

Therefore, this state-operated university, in a state with an unfortunate history of official racial discrimination against blacks of both sexes, would have been easily able, in the name of affirmative action, to avoid hiring blacks for these two positions. We do not accuse the school of being motivated by an anti-black animus, and do not know the racial identity of the two women hired, but simply wish to point out that reverse discrimination in favor of one group can be a tempting way to avoid complying not only with legitimate affirmative action requirements as to other groups, but also to escape the strictures of the basic law of nondiscrimination.



proven prior discrimination against it, may not be favored in other such programs. See the listing of beneficiary groups of various actual quota schemes noted in Brief for Respondent in Opposition to Certiorari, 30 n.13.

Thus, for example, in *Hupart* v. *Board of Higher Education of the City of New York*, 420 F. Supp. 1087 (S.D.N.Y. 1976), Asian-Americans were subjected to reverse discrimination in choosing entrants to a six-year combined college and medical school program. *Id.*, 1103. This, of course, is only to be expected, inasmuch as what Petitioners are propounding here is that all state university admissions officials be given *carte blanche* to discriminate in favor of whichever minorities they please, and against whatever *non-minorities and minorities* they please. Thus, no one is really safe from being a victim of reverse discrimination.

To further show the arbitrary nature of the decision as to which groups are to be included and which to be excluded in "special admissions," it should be noted that Boalt Hall, the University of California at Berkeley's law school, has stopped preferential admission of Japanese-Americans, despite ample prior discrimination against them, including the interning of American citizens of Japanese descent in concentration camps in California during World War II. Furthermore,

> "Currently, the orientals in California, roughly one percent of the population, comprise in some instances 30 percent of the enrollment in certain engineering and technical schools. Were a quota system to be introduced in those schools in order to favor black and Mexican-American applicants, the first losers would be applicants from the disproportionately represented oriental group."
>
> M. Fleming, "The Black Quota at Yale Law School," [letter to Dean Louis H. Pollak], *The Public Interest*, No. 19, Spring 1970, 44, 47.

It is submitted that the foregoing information might be of keen interest to two groups which have filed briefs amicus in this case: the Asian-American Bar Association of the Greater Bay Area, and the National Fund for Minority Engineering Students.

This, of course, raises a question obviously not limited to Asians. For example, should well-qualified blacks be rejected so that Native American students can gain entry to a school? The answer must, of course, be a resounding "no"!

In conclusion, we wish to call the Court's attention to a particularly strong statement on the injustice, in view of the many minorities who compose our country, of arbitrarily selecting some of them for preferential treatment. Dr. Morton Teicher, Dean of the School of Social Work at the University of North Carolina, Chapel Hill, was writing about reverse discrimination in his own profession, but his words apply to all sectors of society:

> "For social workers, the distinctions among people based on race, ethnic background, religion, or creed that inhere in quota systems are particularly abhorrent. Our regard for the individual and our objection to hereditary caste as a status determinant should make quota systems especially impossible for us to accept.
>
> For schools of social work, the argument that quotas for admission will produce student bodies that represent the proportion of racial, ethnic, or religious groups in society is a curious expression of bigotry. Proportional representation on a group basis is highly discriminatory. What taxonomy shall be used to categorize the groups that should be represented? Among the characteristics that defy classification are the following: cultural, economic, ethnic, gender, geographic, linguistic, national, occupational, racial, religious, social class, and tribal.



> Some minority groups include the following: the aged, American Indians, Asian-Americans, Blacks, capitalists, Catholics, Chicanos, easterners, factory workers, farmers, German-Americans, Hispanic Americans, Hungarian-Americans, immigrants, Irish-Americans, Italian-Americans, Jews, the lower class, migrants, nomads, northerners, Polish-Americans, the poor, Puerto Ricans, slum-dwellers, southerners, Swedish-Americans, the upper class, WASPS, westerners, and youths.
>
> Who is not a member of a minority group? Who cannot find a place among this woefully incomplete list of minorities?
>
> We are all minorities. Each of us comes from a distinctive racial, religious, or ethnic stock. Each of us is a newcomer or a descendant of newcomers. Even the native Americans—the Indians—came to North America from across the Bering Straits 25,000 years ago. Each of us has ties to our own roots. Each of us has pride in our origins. Each minority contributes to America—to its building, its evolution, and its maintenance."
>
> Teicher, "Reverse Discrimination," *Social Work*, Nov. 1972, 3, 4.

**C. Reverse Discrimination Stigmatizes Its "Beneficiaries," Confirming Rather Than Repudiating Degoratory Stereotypes, and Inflicting Serious Harm on All Members of the "Benefited" Minority Groups**

In his recent cataloguing of some of the arguments against reverse discrimination, Mr. Justice Brennan noted its tendency to stigmatize its beneficiaries. *United Jewish Organizations* v. *Carey*, ____ U.S. ____, 51 L.Ed. 2d 229, 250-1 (1977) (concurring opinion).

Among the many writers who have eloquently articulated their dismay concerning this particular point are two distinguished black civil rights leaders, whose analysis, although it relates to employment, is equally true with respect to professional school admissions:

> "There are those who argue that, on a short term basis, quota hiring schemes represent an effective and expedient means of resolving a difficult social problem. But we are convinced that the inherent dangers of the quota principle far outweigh any temporary gains they might bring.
>
> One of the most serious dangers of the quota doctrine is that it will perpetuate the stereotypical—and profoundly mistaken—view that blacks lack the ability and the will to make it on their own. Should quotas become institutionalized as government policy, society, as black educator Thomas Sowell has warned, would no doubt conclude that Negroes 'must be given something in order to have something.'
>
> Quotas would further entrench the tendency of society to respond to the call for equal opportunity with tokenism. Quotas, in fact, are tokenism taken to its logical conclusion. Blacks object to the token because it downgrades the dignity and abilities of the individual, cheapening both his or her accomplishments and the accomplishments of other blacks to follow. The same is true of the quota, only to a greater degree. The black who benefits from the quota suffers the uncertainty of never knowing whether he made it on his merits, or was simply hired to meet a government decree. As for the dominant white society, it would automatically question the abilities of all blacks, including the overwhelming majority who have succeeded because of their intelligence, skills, and self-discipline."
>
> Testimony of Bayard Rustin and Norman Hill (of the A. Phillip Randolph Institute), *Federal Higher Education Programs—Institutional Eligibility: Hearings on Civil Rights Obligations Before the Special Subcommittee on Education of the House Committee on Education and Labor,* 93d Cong., 2d Sess., Part 2A, at 253 (1974).



Other prominent voices in the black community have been raised against preferential treatment, for these very reasons. The former Executive Director of the National Association for the Advancement of Colored People, Roy Wilkins, has warned that "[T]here must not be a lowering of standards. Negroes need to insist on being among the best, not on being the best of the second-or-third-raters." Wilkins, "The Case Against Quotas," *ADL Bulletin,* March 1973, at 4, quoted in L. Lavinsky, "*DeFunis* v. *Odegaard*: The 'Non-Decision' With a Message," 75 *Colum. L.Rev.* 520, 527 n.38 (1975).

Dr. Thomas Sowell, an economist, who is also black, points out that "reverse discrimination" is a failure partly because "it creates the impression that hard-won *achievements* of these groups [minorities and women] are *conferred* benefits." Sowell, " 'Affirmative Action' Reconsidered," *The Public Interest,* Winter, 1976, 47, at 63. Several years earlier, he explained, in compelling language, the reasoning behind his view:

> "What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it,* and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among this rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs."
>
> Sowell, *Black Education: Myths and Tragedies* 292 (1972).

Petitioners' Brief, at 48, alleges that "respondent is plainly in no position to assert" the claim that "the Davis program threatens to depict minorities as incapable of holding their own." That statement is seriously in error. Respondent most certainly can assert this claim, because it directly contradicts the aims given by Petitioners as a justification for this program, at 32-3 of their Brief. Stigmatization will obviously work against what Petitioners hope to achieve by means of their preferential scheme. By "stigmatization," of course, we mean both what the general public and other minority persons think about the beneficiaries of such programs, and what these beneficiaries think about themselves.

Petitioners' Brief, at 48 n.55, and the Brief Amicus of the Association of American Law Schools, at 62, both point to the Briefs Amici submitted in support of Petitioners by organizations representing minority groups as proof that programs of preferential treatment in admissions do not stigmatize minorities. If that were so, it is argued, why then would these groups, organized to protect minorities, approve of such programs? We can only respond that, while obviously certain persons in positions of power within various minority-group organizations may indeed approve of preferential treatment, the average non-white American does not. Whether because of the stigmatizing effects of reverse discrimination, or for other reasons, 64% of non-white Americans reject the idea of preferential treatment, 27% favor it, and 9% have no opinion. (The national figures for all Americans are 83% opposed, 10% in favor, and 7% with no opinion.) Press release, The Gallup Poll, May 1, 1977, at 3, summarized in New York *Times,* May 1, 1977, at 33.

Thus, it would seem that regardless of what opinions might be held by various ideologues of all races on this issue, our non-white citizens reject preferential treatment by a substantial margin, indeed. They may well resent bitterly the racist implications of such programs, since it is inescapable that "a racial quota is derogatory of and patronizing to the intended



beneficiary minority." *Chmill* v. *City of Pittsburgh,* No. 1047 C.D. 1976, ____ Commonwealth Ct. ____, ____ A.2d ____, 15 FEP Cases ____, ____ EDP ¶ ____, slip op. at 4 (Pa. Commonwealth Ct., July 15, 1977).

### D. Evidence Indicates That Preferential Admissions Leads to Lowered Professional Standards

Petitioners keep stressing the "compelling state interests" supposedly involved here. We would like, however, to bring up a different kind of notion—a "compelling patients' interest" to have the best possible available medical care.

Whether or not it is a legal right in the enforceable rather than in some inchoate sense, there is doubtlessly a moral right of every patient to have the best medical care available. It would seem that every American would possess this right in equal quantity. However, it would behoove decision makers with the power of selection to try especially to protect the exercise of this right by persons from disadvantaged backgrounds. Such patients, more than most of us, are unable to protect this interest on their own, since they must rely on clinic personnel rather than pick their own personal physicians.

We submit that the medical school's policy here clearly goes against the average Californians' "compelling patients' interest" in receiving high quality medical care, and especially violates that interest in regard to minority-group and other disadvantaged persons.

Medicine is an art, not a science, and much can go wrong even when one is attended by the finest physicians available. But it behooves the decision makers who, in effect, choose our doctors for us by deciding who is to be admitted to our medical schools, to take only the best-qualified people, chosen by the most relevant and well-validated criteria possible. Any tampering with academic standards exposes the innocent eventual patients of unqualified graduates of medical schools to injury and death as a result of malpractice.

Indeed, we would also say that it amounts to a compelling state interest in traditional terms for our doctors to be chosen from the best qualified applicants. That could be accomplished by the Davis medical school if another state interest were recognized—that of ending *all* racial discrimination. If the blatant discrimination now carried on by the medical school were ended, all eventual patients—minority and non-minority, advantaged and disadvantaged—could be assured that their doctors were selected from the best applicants available.

The Brief Amicus of the Antioch School of Law, at 24 n.20, cites a study which purports to show that minority medical students preferentially admitted eventually do as well in clinical contexts as do those regularly admitted. H. Simon and J. Covell, "Performances of Medical Students Admitted via Regular and Admission-Variance Routes," 50 *J. Med. Ed.* 237 (1975). Shortcomings in that research were pointed out by Dr. Dante G. Scarpelli of the University of Kansas Medical Center:

> "The averages cited in this study include the scores of seven minority students who did not pass the National Board Examination. Although attitudinal attributes, basic clinical skills, and the humanism necessary in a physician are crucial and important measurements, they should not weigh more heavily in the final judgment of competence than the basic fund of science necessary to practice modern scientific medicine. . . .
>
> . . . Simon and Covell point out that the success of minority students granted 'admission variances' is due to a flexible curriculum that permits deceleration of progress and reduction of load as well as extensive tutorial and other supports. I question, as I have before, whether the products of decelerated programs are capable of attaining competence in the strict sense of the word. Is a student who, by virtue of low MCAT scores and grade-point average, takes only one course at a time in contrast to the usual two or three, and often repeats such courses two or three times, ever capable of achieving true competence? It seems to me that our responsibility as medical educators is to produce the best possible professionals, not marginally competent or incompetent ones. To do less is not in the best interests of society or the profession."
>
> Letter to the Editor, 293 *New Engl. J. Med.* 206, 207 (1975).[12]



The Antioch Brief Amicus, at 26, also mentions an incident at the Harvard Medical School "where one professor attacked minority admissions citing the example of a minority student who had failed Part I of the National Boards five times and yet was granted his M.D. degree." This is incorrect. The actual article, which is reprinted as an appendix *infra,* does *not* attack lower admission standards, and, at the beginning of its third paragraph, even approves of them "to help disadvantaged groups." It really deals with grading, retention and graduation criteria—and warns how these are being impaired and are slipping badly. B. Davis, "Academic Standards in Medical Schools," 294 *New Engl. J. Med.* 1118-9 (1976).

For a description of the furor that arose in response to this article, see J. W. Foster, "Race and Truth at Harvard," *The New Republic,* July 17, 1976, 16. It should be noted that the problems Dr. Davis discusses come about because of lowered admissions standards. Although he may favor them, within limits, these Amici believe that no racial variances for either admissions or standards for marking and promoting students, and awarding them diplomas, can be tolerated.

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[12] We reprint, as an Appendix, an article by Dr. Scarpelli. "Minority Admissions—A Realistic Assessment," 292 *New Engl. J. Med.* 860 (1975). But we do not adopt Dr. Scarpelli's views insofar as he may favor any preferential treatment for well-qualified minorities as against less-qualified minorities, or any preferential treatment for disadvantaged persons on a non-racial basis. Rather, we included his views to show the situation facing the medical schools today, as a result of existing preferential admissions policies.

Dr. Davis' charges provoked a response from officialdom at his institution, but according to Dr. Michael Halberstam, the Dean of Harvard Medical School was engaging in

> "circular reasoning when he cite[d], as one measure of Harvard's minority recruitment program, the excellent internships many of these students have obtained. Internship directors seek out minority candidates just as medical schools do. The eagerness of the medical academic establishment to make up for past racism has resulted in admitting, carrying through medical school, and passing into house-officer programs a distinct subset of students who are clearly marginal at best, substandard at worst, in their academic ability."

Halberstam, "A Disservice to Minorities," *American Medical News,* December 13, 1976, Impact section, 2.[13]

[13] Dr. Halberstam has further stated:

> "One does not have to be a genius or a molecular biologist to be a good physician. I've pointed this out many times in the past, and Victor W. Sidel, MD, and H. Jack Geiger, MD, reemphasize it (in a recent article in The New York *Times*). They argue that much of the concern about academic ability of medical students overlooks the real purpose of medical education.
>
> Competent physicians must understand the cultures and backgrounds of their patients, Drs. Sidel and Geiger write, and for this reason 'disadvantaged' medical students may bring benefits to their eventual patients that academically more distinguished students cannot.
>
> True, in a sense, but the tone of the article by Drs. Sidel and Geiger is disturbing. They concede academic standards are required, but they keep talking about 'an accepted minimum threshold,' 'a minimum of scientific and intellectual ability,' and meeting of the 'basic intellectual requirements.'
>
> This is not a very glorious banner to carry into the debate about medical education. Moreover, it is a strange device when employed by some of the same people who attack American medicine as turning out such-and-such a percentage of 'incompetent physicians,' doctors whose scientific background is allegedly so sketchy that they depend on drug companies for prescribing information and cannot pass examinations about antibiotics.
>
> In a more profound sense, it is condescending to black physicians and to 'disadvantaged' population groups, implying somehow that many of the former cannot exceed 'basic intellectual requirements for medical education' and that many of the latter do not need any more.
>
> We don't need anyone telling us that concern about academic standards is disguised racism. We certainly don't need anyone telling us—or the public—that brute intellectual ability is unimportant in primary care medicine. The American public does not need a generation of good-ole-boy, kind-hearted, bumbling, stumbling neighborhood docs, barely conversant with the old medical literature, to say nothing of the new.
>
> God knows, it's hard enough for the finely tuned graduate of the scientific 1950s and 60s to keep up. Putting this responsibility in the hands of men and women who can barely read enough to squeak by graduation will haunt us 20 and 30 years into the future.
>
> Physicians may have to make only two or three life-saving decisions a year, but when they do had better be smart enough to make them properly. The medical schools owe the profession, and the public, that ability." *Id.*



Dr. Halberstam makes clear, however, that most minority students are, fortunately, not in that category. But many of the minority students do not even get far enough to enter internship programs.

Petitioners' Brief presents (at 45 n.54) some data designed to show that minority students do very well in medical school. Unfortunately, that is simply not the case. The latest available figures show a disturbingly high rate of failure among minority students, indicating the inevitable results of admitting unqualified and unprepared applicants. Incredibly, not only the percentage but even the *absolute number* of black students who repeat their first year is greater than that for non-minority students, according to the latest figures. 159 of the 1,052 black students repeated their first year compared to only 157 of the 13,808 non-minority students. Expressed as percentages, 15.1% of the black students repeated the first year, as compared to only 1.1% of non-minority students. For Puerto-Rican students the figure was 10.3% repeating, for Mexican-American students 9.2% and for American Indian students 6.6%. "Medical Education in the United States, 1975-1976: Undergraduate Medical Education," 236 J.A.M.A. 2957, Table 15 at 2963 (1976).

Another table shows that of those black students admitted in the 1973-1974 class, only 87% were retained as of June 1976. For non-minority students, the figure was 97%. Although more recent figures are somewhat more favorable for minority students, it may well be that the schools involved simply are giving the less qualified of these students a somewhat longer chance to succeed at their studies before dismissing them—or before the students themselves simply give up and drop out. *Id.*, Table 24 at 2964.

These statistics make unpleasant reading indeed, and we regret the need to mention them, but doing so is essential in order to help demonstrate why reverse discrimination must be eliminated. Eradicating it would prevent: (1) further harm to innocent minority students used as pawns by medical schools callously wishing to raise their "body count" of such persons regardless of the human cost and (2) the inexcusable waste of vital medical training resources stemming from "dropping out" and dismissal for academic reasons.

The vaunted benefits of having a "racially diverse" student body would, it would seem, evaporate in the face of the widespread academic failure of preferentially admitted minority students. Obviously, it is a distinct disservice to these young people to admit them to schools where they cannot succeed, and where their poor performance confirms rather than dispels the false stereotypes about minority abilities which are no doubt shared by medical students and medical school instructors probably to the same extent that they exist in other strata of society. And one can only guess at the trauma inflicted on the failing minority students themselves, who must experience the shame and humiliation. Such statistics do not seemingly cause much concern to the medical school administrators who keep implementing the programs of preferential admissions which inevitably end in such human tragedies. If they really cared about minority students—and if they really cared about the other victims of preferential treatment—the applicants who are denied the places rightfully theirs, solely because of their



race—these unfortunate events would not occur. But of course, the basic element of racial discrimination is this very inability to see people as human beings who can suffer and cry and bleed, and the insistence on looking at them as faceless members of groups, all of whose members are presumed to possess certain characteristics and to collectively possess rights which are not possessed by an individual *qua* individual. A decision-making process which considered applicants as human beings individually possessing basic human rights would reject outright the idea of preferential treatment.

However, Petitioners, in the guise of helping "society," manage to hurt both minorities and non-minorities simultaneously.

### E. There are Alternatives to Preferential Admissions that will Accommodate Disadvantaged Applicants of all Groups

The existence of a special "minorities-only" admissions program puts undue focus on the minority status of such persons, making it appear as if they could not get into professional schools on their own merits, and that their minority status has an inherent relation to that fact. Instead of overcoming the unfortunate stereotypes about minorities being inferior to non-minorities, such a scheme only accentuates them and gives these canards more credence.

Although, as we documented in the Introduction, most Americans reject reverse discrimination, these Amici are certain that the overwhelming majority of our citizens believe in giving a fair chance to every person, regardless of group identification, who has been—through no fault of his own—the victim of past deprivation. Any non-discriminatory efforts to accomplish that end (without lowering academic standards) would, we think, win popular support, and eliminate the stigma that would otherwise attach to the minority graduates thus admitted. Such minority alumni would be seen as no different from the non-minority beneficiaries of such a program.

J. H. Bunzel, "Bakke vs. University of California," *Commentary,* March 1977, 59, 64.

As a well known black professor of labor law puts it,

"In one year here, [Harry T.] Edwards has observed that blacks at the law school feel 'alienated' because 'their qualifications are still being questioned' by alumni and employers. To quash challenges to the incompetence of minority students and graduates, the law school 'must insure that blacks, women, and other minorities come in on an equal basis.'"

Harvard Law Record, September 24, 1976, at 6.

Certainly the value of having more racial and ethnic minorities in a professional school, to interact with other students—a situation which petitioners believe so desirable that it amounts to a compelling state interest—is markedly decreased, if not destroyed, by the knowledge on the part of all students that these minorities were preferentially admitted.

While preferential treatment should not be extended on grounds of socio-economic disadvantage (even if this could be done on a non-racial basis), there is nothing wrong in taking into account, when evaluating the credentials of a particular candidate, that he or she comes from a socio-economically disadvantaged background. Of course, it must not be assumed that all the members of any particular group come from such background, since that is obviously not so.

In defense of a disadvantagement approach to medical school admissions for minorities and other deserving students who have not gotten the proper background, one physician points out this obvious injustice in existing programs:

"At present, even when the black applicant's family is middle-class, professional, and not deprived, that applicant gets preference over a white applicant of less affluent and privileged background. Under circumstances in which an academically better but poverty-level white competes for



admission with a less qualified, affluent black, under affirmative action the black gets admitted. Is this fair? . . .

In recognizing that much can be said for special procedures for deserving students of deprived backgrounds, I think it far better to base these programs on economic need, rather than on racial, ethnic, or sex determinants. If economics were the touchstone, in fact, many blacks would get preference, but so would some equally deserving underprivileged whites. Furthermore, no constitutional proscriptions would be violated, no quotas would be defined, no undeserving students would be carried for the sake of a false premise, and no new mythology would be created."

A. L. Flick, Letter to the Editor, 293 *New Engl. J. Med.* 6 (1975).

While these Amici do not agree that preferential treatment for the disadvantaged is the answer, it would certainly be an improvement over the present policies. We believe that rather than have supposedly non-discriminatory quotas for the disadvantaged, individuals with claimed backgrounds of past deprivation should first be given remedial assistance in developing their capacities to their fullest, so that they may compete successfully in the *regular* admissions process.

Petitioners and their supporters urge that there is *need* (i.e. there is no workable alternative) to resort to the sort of preferential scheme as employed by the medical school at Davis—and at other professional schools, but this *is myth*.

For example, other professional schools, quietly and without fanfare, can and have *significantly* achieved an increase (numerically and percentage-wise) in minorities enrolled without resort to quotas, goals or other devices for excluding non-minorities by employing pre-admission remedial education programs.

The United States Naval Academy, has raised, between the 1976 and 1980 entering classes, the numbers of minorities

("blacks" and "ethnics") as is demonstrated in one of the Appendices attached (a copy of a letter of the Executive Director of the U.S. Naval Academy Foundation) by a process of upgrading disadvantaged potential candidates so that they might qualify under the Academy's traditional standards and be equipped to compete with other non-"disadvantaged" Academy students. [14]

Specifically, the minorities entering *rose* from 167 to 222 between the 1976 and 1980 classes (an increase from 12.5% to 17.1% of total enrollment) during which period the entering class *declined* from 1334 to 1229.

Although an undergraduate institution, the Naval Academy is actually a professional school, with strong emphasis on the exact sciences, and looks for certain unusual personal qualities in its applicants. Thus its experience is a valid precedent for what might be done by medical schools. See also, for a proposal of "pre-college training centers," T. Sowell, *Black Education: Myths and Tragedies* 308-10 (1972), and Chapters III and IV, dealing respectively with high school and college programs for would-be black physicians, in J.L. Curtis, *Blacks, Medical Schools, and Society* (1971).

Such programs in medical school will be facilitated by the Health Professions Educational Assistance Act of 1976, P. L. 94-484. See especially the programming described in 42 USC § 295g-7, *which precisely meets these needs for medical schools. Congress has authorized $20,000,000 for each of the next three fiscal years for these purposes. Id.*

The House Report on the original bill observed that white students from low-income families had not been successfully recruited by the medical schools, whereas black students from

[14] "In addition to the 70 blacks who will qualify" (for entrance in 1977) "about 50 will be put into special schools, their tuition financed by either the government at the Naval Academy Preparatory School at Newport or by the Foundation if they are sent to a private prep school. Next year we hope a goodly percentage of those 50 will be qualified to enter." Letter of July 15, 1977 from William C. Mott, R. Adm. U.S.N. (ret) to J. W. Finley, Jr.



such backgrounds had been. House Report No. 94-266, Part 1, Interstate and Foreign Commerce Committee, 61-62; reprinted at 4 USC Cong'l & Admin. News 5003-4 (1976).

Petitioners' Brief, at 38, alleges that "[A] truly racially 'neutral' disadvantaged approach would do little more than substitute less-affluent whites for more-affluent whites. Whatever the desirability of such a result, it would not achieve the goal of significant minority participation."(footnote omitted). This overlooks the fact that large numbers of disadvantaged whites from various ethnic groups and in rural poverty pockets scattered throughout our country deserve physicians to take care of them, and if Petitioners hypothesize correctly that "specially admitted" students will return to indigenous areas once they are graduated, and practice there, then Petitioners are denying these poor whites medical help which they badly need. Perhaps it is not as "trendy" to help white ethnics and poor rural whites as it is to help other minorities. Once again, we see Petitioners' double standard in action.

With respect to law school admissions, the point has been made that if preferential treatment were abolished, many minority applicants who would then be turned down by the highly selective law schools would still be eligible to be admitted on a merit basis to the less selective schools. Dean of New York Law School E. Donald Shapiro believes "that perhaps his school would start getting minority applicants, who, under a special admission program, would ordinarily have gotten into Harvard or Yale." *N.Y.L.J.*, February 25, 1977, p.1, at 2. Another writer has elaborated on this point:

> "There are many good regional and local law schools in Philadelphia, Boston, Los Angeles and other metropolitan areas, where black law students can compete with white law students on equal terms and where they can study law in competition with students of similar qualifications and aptitudes. Many of these law schools do not follow Yale's policy of numerically limited enrollment and are geared to

handle within reason all students who can qualify for admission. In view of the prevalence of these law schools, the relative ease of admission to many of them, and their flexibility in handling increased numbers of students, the initiation of a system of proportional representation for black students at Yale Law School serves no genuine need or purpose."

M. Fleming, "The Black Quota at Yale Law School" [Letter to Dean Louis Pollak], *The Public Interest*, No. 19, Spring 1970, 44, 48.

A recent contribution to the psychological literature sheds some light on the issues in this case. It shows that, psychometrically, it is possible to measure individual disadvantage, and also to predict the possible utility to society of educating that person. This could be done on a non-racial basis. M. Novick and D. Ellis, Jr., "Equal Opportunity in Educational and Employment Selection," 32 *American Psychologist* 306 (1977).

### F. Petitioners Fail to Grasp the True Meaning of Merit and Why it Should Preserved

Petitioners' Brief makes numerous mistakes in its discussion of the "merit system" in medical school admissions. For example, at 31-2 it confuses a legitimate idea—the inclusion of reliance on appropriate non-cognitive factors in addition to science proficiency—with something grossly illegitimate: racial discrimination in favor of minority applicants.

At 50-51, Petitioners criticize the "premises underlying the plea to meritocracy in opposition to the Davis Program. . . ." *Id.* at 50. What they forget is that if the normal admissions process, run on merit principles, does not in fact select the best doctors, it is obviously keeping out good white applicants as well as minority ones. Therefore, it should be changed. But this is obviously no excuse for discrimination. Respondent is not attempting to force false assumptions as to educational



policy on Petitioners, as charged at 51. Rather, he is only trying to enforce Petitioners' legal obligation not to discriminate racially against him. While faculty judgments that supplement "numerical indicators" are permissible, *id.* 51-2, Respondent more than satisfied those in every respect. He was rejected nonetheless, though, because his skin was the wrong color.

Furthermore, with respect to law school admissions, the numerical indicators, "if anything, overpredict the performance in law school of blacks and Mexican-Americans." Law School Deans' Brief on Certiorari, 18 n.5; L. Lavinsky, "*DeFunis* v. *Odegaard*: The 'Non-Decision' With a Message," 75 *Colum. L. Rev.* 520, 531-2, n.70. (1975). These Amici, however, do not wish to defend the existing standardized tests for either law school or medical school admissions. We say only this: if the tests are not valid in predicting who will be the best attorneys or physicians, let them be set aside, or at least discounted with respect to their relative weight, and let better measures be developed.

But protests against the existing standardized tests or other forms of measurements, however justified, do not mean that objective standards can simply be dropped, and discriminatory selection instituted. [15]

[15] The Brief Amicus of the Antioch School of Law, at 14-15, discusses the role of "black English" as something that should be taken "into account in interpreting test scores. . . ." *Id.* at 14. But, as the President of Boston University points out,

> "Nothing could be farther from racism or elitism than requiring students from the ghetto to learn standard English. For this is to treat them as the equals of the great majority of students.
> It is particularly reprehensible for white professors and white middle-class students to encourage black students in the mistaken belief that it does not matter whether they learn to speak and write with educated middle-class proficiency. The black student who speaks only ghetto English is not able to communicate fully. He can communicate effectively only with those who speak his own dialect, but an educated black can converse with anyone in the English-speaking world. White professors and students, already proficient in standard English, retain their monopoly in it and protect themselves from black competition by encouraging blacks to renounce their educational opportunities. Thus

The same considerations apply in regard to admissions as apply to a related subject—employment. It has been held that neither the mere reluctance of minorities to apply for jobs from which they have historically been excluded, *nor the mere fact that existing screening and testing measures have a discriminatory impact on actually qualified job applicants,* justifies preferential treatment in employment. Rather, recruiting of applicants to enlarge the pool, and the development of non-discriminatory testing must be pursued. *State Dept. of Administration* v. *Dept. of Industry, Labor & Human Relations,* ___ Wisc.2d ___, 252 N.W. 2d 353, 358 (1977).

Petitioners misstate the issue in their Brief, at 53, when they assert that universities must be able to "serve other goals" in addition to merit. (They refuse to concede the fact that it is merely racial discrimination that the law relevant to this case forecloses as a device to reach ends deemed socially useful; other forms of criteria for selection of, say, medical students may still be permissible, and indeed are.)

The three examples picked by Petitioners to serve as examples of the "other goals" are indeed unfortunate choices from Petitioners' standpoint. *Id.,* 53. The question of civil service employment preferences for veterans has come under vigorous litigative attack as being discriminatory against women, to whom opportunities to serve in the armed forces have been relatively foreclosed. Efforts to recruit medical students likely to practice in rural areas, although entirely legitimate, must be implemented on a non-racially discriminatory basis. As for *Morton* v. *Mancari,* that decision and its relevance to the instant case are discussed *infra*; suffice it to say here that the statutory hiring preference enacted by Congress and upheld by the Court in *Morton* gives no comfort to Petitioners herein.

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blacks may remain tragically isolated from the mainstream of their national culture, and pay the price for the ideological whims of whites."

J.R. Silber, "The Need for Elite Education," *Harper's,* June 1977, 22, 24.



Respondent asks this Court not to "posit a particular view of the merit principle and then to mandate exclusive adherence to it by independent entities commissioned by the citizenry to make decisions on matters of social policy of abundant complexity and minimal susceptibility to fixed answers." *Id.,* at 54. He merely asks the Court to rule again, as it has so many times on behalf of non-whites, that one's quantum of merit, and one's right to be free from discrimination, does not in any way depend on one's race. Petitioners simply fail to acknowledge that merit is invariably raised by Respondent and all the Amici who support him, not in its own right but in the context of non-discrimination—a context which of course Petitioners insist on ignoring.

Certain briefs submitted in this case allege the existence of various abuses and violations of the merit concept in higher and professional education admissions, arguing that such lapses from the merit standard justify preferences for minorities. But the obvious answer to this line of attack is that—while they may not contravene the Equal Protection Clause—non-merit admissions based on improper criteria should be banished from academe.

As an example of how such practices can be eliminated, we call attention to a 1975 incident at the University of South Carolina Law Center, *where a protest by the faculty resulted in the forced withdrawal of eleven students who had been denied admission to the school but had then been allowed to enroll under a waiver granted by the University's board of trustees.* Several of the students were offspring of leading figures in South Carolina politics. Columbia, S.C. *State,* Oct. 23, 1975, 1-A; *Id.,* Oct. 24, 1975, 1-D.

Ironically, in that case, an inspection team from the American Bar Association, after an on-site visit, had warned that these "non-merit" admissions jeopardized the school's ABA accreditation. However, the ABA (evidently comfortable with a double standard) has nothing but praise for preferential

admissions of minority students, as evidenced by its Brief Amicus filed in the instant case—despite the fact that those programs, too, involve a waiver of normal admissions standards.

In conclusion, these Amici wish to emphasize that surely the great increases in the numbers of minority students now attending college will supply a large enough pool of well-qualified minority candidates for medical and other professional schools. In fact, the number of black college students under 35 has more than doubled since 1970, from 0.5 million to 1.1 million (in 1976). Blacks, in 1976, comprised 11.7% of the civilian population between the ages of 16 and 34, and black students were 10.7% of all college students in that age range, showing that the gap between the races is rapidly narrowing. In fact, while 76.7% of the black collegians were attending full time, only 71.4% of the whites were. U.S. Dept. of Commerce (Bureau of the Census), Current Population Reports: Population Characteristics—School Enrollment—Social and Economic Characteristics of Students: October 1976 (Advance Report), Series P-20, No. 309 (July 1977), 2, 5.

Perhaps the reason that Petitioners and certain Amici supporting them find so few minority applicants who satisfy the "numerical indicators" is that many of the most *well-qualified black students are being held back,* denied college admission and financial aid because—incredibly—they are perceived, by black and white decision-makers alike, as non-needy and "middle class" instead of "authentic ghetto types." For thorough documentation of the existence of this bizarre dichotomy, see T. Sowell, *Black Education: Myths and Tragedies,* Chapters 5 and 6 (1972). (One reason for the rejection of the "middle class" blacks might be that the "ghetto types" will lend more "diversity" to campuses, inasmuch as that is such a valued quality, according to Petitioners and such Amici as the American Association of University Professors.)



**G. Obtaining "Diversity" in a Student Body Does Not Justify Reverse Discrimination**

One of the prime excuses alleged by Petitioners as justifying their quota scheme is that increased numbers of minority students in the medical school will provide a seemingly priceless quality called "diversity." *E.g.,* Petitioners' Brief, 51. Indeed, the Brief Amicus of the American Association of University Professors is entirely devoted to this proposition.

These Amici agree that diversity in a student body can be beneficial and should be encouraged. But doing so seems an incredibly flimsy reason to deprive someone—anyone—of his constitutional right to be free from racial discrimination. With all due allowance for the value of having a varied group of students to hobnob and otherwise interact with each other during the four years of medical school, or three years of law school, we are most surprised to see it seriously urged that considerations relating to the composition of a transient student body outweigh, on a constitutional scale of values, the rights guaranteed by the Equal Protection Clause.

Since the proponents of reverse discrimination are probably incapable of seeing the legitimacy of this argument when made in behalf of a Bakke, perhaps they might grasp the preceding point more easily if the situation were reversed, and an almost 100% black state-run college began to practice overt discrimination against black applicants so as to make room for more white students, thus promoting "diversity" and helping both blacks and whites. Surely that would be unconstitutional even in Petitioners' eyes.

Petitioners, and their allies, might also pause to reflect that the very benefits to be obtained from racial diversity will evaporate if both white and minority students realize that the latter were admitted preferentially and that their qualifications are well below those of the former. It is precisely this kind of

awareness—which all too accurately reflects the factual situations obtaining today in American professional schools, graduate schools, and colleges—that leads to the kinds of attitudes described by a young black attorney:

> "Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and, like certain members of the faculty, had developed paternalistic attitudes toward us. The silence, the heavy sense of expectation, fell on all of the blacks in a classroom whenever one of us was called upon for an answer. We waited, with the class, for the chosen man to justify the right of all of us to be there. And the busy silence between the time a black student was called on and the time he began to make an answer was alive with all our answers being pushed, by sad attempts at some kind of empathy, from all sections of the huge room to the mind of the man who, for the moment, represented all of us. The rest of the class would wait sometimes, and embarrassed white faces would turn away while the instructor repeated the question, and papers would rattle in signals of sympathy. And when an answer came, however poor it was, there would be relief visible in the faces of the white students and the instructor, and audible in the renewed breathing of the rest of the black students. After class, the student who had been called on, and a few of his friends, might walk hurriedly down the hall; the black student perhaps apologizing, perhaps rationalizing his inability to give a better answer. At such times it would not be unusual for a white friend to say, "I'm glad he didn't call on me. I couldn't have answered *that* question myself." But it would be very unlikely that the black student would agree."

J.A. McPherson, "The Black Law Student: A Problem of Fidelities," *Atlantic*, April 1970, 97, 99.



Another writer says much the same:

> "If in a given class the great majority of the black students are at the bottom of the class, this factor is bound to instill, unconsciously at least, some sense of intellectual superiority among the white students and some sense of intellectual inferiority among the black students. Such a pairing in the same school of the brightest white students in the country with black students of mediocre academic qualifications is social experiment with loaded dice and a stacked deck. The faculty can talk around the clock about disadvantaged background, and it can excuse inferior performance because of poverty, environment, inadequate cultural tradition, lack of educational opportunity, etc. The fact remains that black and white students will be exposed to each other under circumstances in which demonstrated intellectual superiority rests with the whites. If to compensate for disadvantaged background, the faculty discriminates among students in its grading and marking, its double standard will be quickly perceived by both groups of students. Because of the Law School's current admission policy the difference between the two groups will be centered on the factor of race."

M. Fleming, "The Black Quota at Yale Law School" [letter to Dean Louis Pollak], *The Public Interest* No. 19, Spring 1970, 44, 45-6.[16]

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[16] Justice Fleming goes on to point out the inevitable results of the double standard in admissions:

> "No one can be expected to accept an inferior status willingly. The black students, unable to compete on even terms in the study of law, inevitably will seek other means to achieve recognition and self-expression. This is likely to take two forms. First, agitation to change the environment from one in which they are unable to compete to one in which they can. Demands will be made for elimination of competition, reduction in standards of performance, adoption of courses of study which do not require intensive legal analysis, and recognition for academic credit of sociological activities which have only an indirect relationship to legal training. Second, it seems probable that this group will seek personal satisfaction and public recognition by aggressive conduct, which, although ostensibly directed at external injustices and

**H. The Argument that Minority Professionals Should and Will "Return to the Ghetto" is Specious and Misleading**

Petitioners, and some of the Amici supporting them, such as the Antioch School of Law and Dr. Jerome A. Lackner (Director of California's Department of Health), argue that minority medical graduates are more likely than their non-minority colleagues to practice in areas of minority concentration. On that point, the findings of Dr. James L. Curtis, Associate Dean at Cornell University Medical College, are most germane. Dr. Curtis is in charge of minority student affairs at his school. The NAACP Legal Defense and Educational Fund's Brief Amicus, at 65 n.189, cites Dr. Curtis' book *Blacks, Medical Schools, and Society* 147 (1971) as authority for the assertion that black medical students tend to return to ghetto neighborhoods to practice, upon graduation. Petitioners' Brief also cites this source. *Id.*, 25 n.24 at 26. ***However, what Dr. Curtis really says*** is that black students, when they are first applying to medical school, *allege* that they will do so. Dr. Curtis' remarks are worth quoting at length, since they shed a different light on this question:

> "Will the black graduates return to practice medicine in the ghetto?
>
> * * *
>
> I had no doubt that they themselves believe it would be a noble and altruistic act if they were to open up an office, presumably as a solo practitioner, and become a general practitioner in a black urban ghetto. Similar impressions

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problems, will in fact be primarily motivated by the psychological needs of the members of the group to overcome feelings of inferiority caused by lack of success in their studies. Since the common denominator of the group of students with lower qualifications is one of race this aggressive expression will undoubtedly take the form of racial demands—the employment of faculty on the basis of race, a marking system based on race, the establishment of a black curriculum and a black law journal, an increase in black financial aid, and a rule against explusion of black students who fail to satisfy minimum academic standards." *Id.*, 46.



> were found from my conversations with other medical admissions interviewers. How is this explained? Perhaps most superficially it can be explained as part of the current black student ideology, that the student feels he is expected at least to make such a statement. It is easy to speculate further that the prospective medical student probably perceives that such statements seem to have a favorable effect on other black students who might otherwise deride his choice of a conservative field, and it might also have a favorable effect on whites who harbor either romantic liberal or segregationist feelings. My own first reaction to this phenomenon was to consider it a current fad or fashionable view, probably of a passing nature. My further thoughts were that some of them undoubtedly would return to the ghetto, particularly if they had formerly lived in all-black neighborhoods as almost all of them had, but that they would remain only so long as it took them to earn enough money from their practice to move away to a suburb or to a more desirable neighborhood in the city.
>
> * * *
>
> In an earlier day, P.B. Cornely pointed out that Negro physicians, although educated at Howard and Meharry presumably to take care of the health needs of the great mass of southern rural Negroes, were actually migrating to urban communities to serve the health needs of Negroes migrating to more prosperous urban communities. In precisely the same way, we can almost certainly predict that black physicians will increasingly migrate to the suburbs to care for the health needs of the more prosperous blacks who migrate to the suburbs."
>
> Curtis, *Blacks, Medical Schools and Society* 147-9 (1971) (footnote omitted).

Dr. Curtis explains that these students, like previous black physicians, will tend to work mostly with black patients, *id.* at 148-9, but he emphasizes:

> "It is to be hoped that the increased numbers of black physicians who will be receiving superior educational preparations for their successful careers as physicians will be utilized as physicians for the whole American community, and will not be encouraged to limit their work to black patients only. With increasing desegregation in many areas of American life, and an increasing receptivity to a racially integrated society, it is most unlikely that black and white health-care systems and markets can be maintained, even if racist extremists attempt to keep these segregated systems artificially intact."
>
> *Id.* at 162-3.

He points out that the whole question of whether minority graduates will open offices in poor minority neighborhoods may be irrelevant:

> "It is not my impression, however, that the great bulk of medical practice and health care in the ghetto is dispensed from doctors' offices. It is my distinct impression that most black patients go to municipal or voluntary hospitals or clinics for medical care, and that it is the quality of care given in these facilities which determines their health outcome. Certainly this is true for the more serious or chronic diseases and disorders, those requiring the most complicated diagnostic procedures and therapeutic programs. Those of my black professional colleagues who are the most highly trained specialists spend a large part of their time in such hospital and clinic settings, and also spend part of their time in medical school teaching, research, or administration. Moreover, most of my colleagues either took part in, or had a lively interest in, the struggle of black professionals to gain appointments on the staff of these hospitals, and to obtain the admission and



> equal treatment of Negro patients to these public and private community institutions. As the practice of medicine has become increasingly dependent on scientific technology, it has depended more and more on the highly trained specialist staff at teaching hospitals. The solo practitioner practicing in his office in the ghetto, or in any other neighborhood, is only one small element in the medical manpower team. It would be unfortunate indeed if a disproportionately large share of the black physicians who will be graduating during the next decades had a too-limited view of their potential medical role."
>
> *Id.* at 149-50.

Dr. Curtis, of course, is saying that not only will black doctors probably *not* return to the ghetto and remain there, but that this fact is good news. Similar sentiments have been expressed with respect to minority lawyers:

> "It is a proposition laced with irony that cyclical poverty can be arrested by taking some of the most promising and talented blacks, placing them in the lowest-paying, least-powerful jobs in the legal profession, and 'sending' them to the ghetto where they will rarely earn enough money to break out of the 'cycle' themselves, much less enhance the economic status of their clients.
>
> If courts are to insist that breaking 'cyclical poverty' must be the *leitmotif* of special admissions, perhaps blacks should be steered towards Wall Street where they can obtain a modicum of wealth and prestige, and the ability to invest in black enterprise.
>
> Indeed, argues Norman Redlich, dean of the NYU Law School, 'It's important for black lawyers to be in Wall Street firms; white clients and attorneys should see black lawyers.' "
>
> Joyce Curll, NYU Law School's admissions director, agrees: 'If we stereotype minorities simply as working in

community law offices, then another leap will be necessary 20 years hence to get them into corporate law firms. They have a right to be there now.'

Lloyd Zimmerman, "Minority Admissions and the Courts," *Legal Focus* (Published by the Second Circuit, American Bar Association/Law Student Division) 1, 2 (October, 1976).

Thus, the "return to the ghetto" argument is not one on which Petitioners can rely.

## I. Reverse Discrimination Is Decidedly Not A Means Of Improving Minorities' Health Status

While it cannot be denied that programs of reverse discrimination are tempting indeed to lazy professional school administrators who are looking for some way to impart the notion that they have a commitment to helping minority groups, the fact remains that this Court has "never held administrative convenience to justify racial discrimination." Douglas, J., *Dissenting, De Funis* v. *Odegaard,* 416 U.S. 312, 341 (1974).

There are ways available to meet the health needs of the minority community without resorting to preferential treatment (which would actually *hurt* the minority community).

After pointing out, correctly, that minority groups have desperate needs for better health care, Petitioners then make a quantum jump and allege that producing more minority doctors is necessary to solve such problems. That assertion is totally wrong. (Let it be noted, of course, that even if the statement were true it would not excuse the use of racial discrimination to produce minority doctors.)[17]

[17] This is so because, under the Constitution, official racial discrimination is simply *foreclosed* as a route to alleged social progress. Any government leader wishing to think up new answers to our country's problems must look elsewhere, for state discrimination is not a permissible option in the American system. It has taken over a hundred years, countless litigations, and much spilled blood to drum this point into the heads of American officialdom, with respect to the protection of non-whites—and numerous functionaries, in both high places and low, still have not accepted that fact. Now, though, it appears that the battle must be fought all over again, to protect whites and some non-whites from discrimination in favor of other non-whites.



But the fact remains that it is not true. And to demonstrate its falsity, we must expose the two-faced nature of the proponents of reverse discrimination in medical school admissions. In forums such as this Court, they declaim about a supposed desperate need for physicians from minority groups, who, they insist, can be "produced" only through rampant institutionalized racial discrimination. But when the topic shifts from defending reverse discrimination to improving health care these same medical authorities along with their colleagues, express markedly inconsistent views.

They are generally agreed that merely producing more new physicians (without regard to their race) will not have an appreciable impact on the nation's health in general or the health of our poorer citizens in particular. Other measures, such as the judicious use of auxiliary medical personnel in new, innovative ways, and a vastly expanded emphasis on preventive medicine, are what will really work. While this statement may well come as a surprise to those unfamiliar with the contemporary professional literature on health care delivery, this is what the experts in the field believe.

> "Increasing the number of hospitals, satellite community clinics, health care workers, or removing hospital beds, has a negligible impact on the population's health. Epidemiological studies have shown that housing, nutrition, income, occupation, education and santitation are far more important variables affecting our health."
>
> D. W. Gordon, "The Politics of Health Care," New York *Times,* June 26, 1977 § 4, 19.

Really substantial reductions in mortality rates, and marked increases in the general level of health, will come only

from preventive measures and better patient education, not frantic intervention after the fact by even the most skilled physicians, according to Dr. Leon Eisenberg, a Harvard professor of medicine. Eisenberg, "The Search for Care," 235, 244-5, in J.H. Knowles (ed.), *Doing Better and Feeling Worse: Health in the United States* (1977) (also published as the Winter 1977 issue of *Daedalus*). And the Vice President for Health Sciences at the University of Arizona, Tucson, Dr. M.K. DuVal, tells us: "Most of the factors that bear on our health as individuals lie outside the control of traditional medicine." DuVal, "The Provider, the Government, and the Consumer," 185, 192, in J.H. Knowles (ed.), *id.*

He explains that health, including not mere freedom from diagnosable disease, but the functioning of the body and mind at their full capacities, "[i]s only marginally affected by medical care; indeed, much of contemporary scientific medicine," with its focus on disease, " is almost irrelevant to good health." Instead, "[t]he individual's behavior, his environment, and his living habits have a far greater impact on his health than anything medicine might do for him." *Id.*, 185. In his own essay, the book's editor, Dr. John H. Knowles, documents this thesis in exhaustive detail, with separate discussions of the most prevalent and serious diseases. Knowles, "The Responsibility of the Individual," *id.*, 57.

Hopefully, the passage of the National Consumer Health Information and Health Promotion Act of 1976, P.L. 94-317 (Title I), which is directed to meet these specific needs, will help move the nation forward in this area.

With respect to innovations in the use of auxiliary health manpower, see Committee for Economic Development, *Building a National Health Care System* 80-3 (1973); U.S. Dept. of Health, Education, and Welfare, *Trends Affecting the U.S. Health Care System,* (Dept. of H.E.W. Publication No. HRA 76-14503) 373-81 (1976).



Eli Ginzberg, Professor of Economics at Columbia and a nationally known expert on manpower problems, cautions that "[T]he direction of physicians into the ghetto may make little sense if they are to provide routine ambulatory care. Nurse practitioners and health aides drawn from the community are likely to do a better job, especially if they are effectively linked to hospitals." Ginzberg, "Health Services, Power Centers, and Decision-Making Mechanisms," 203, 207, in J.H. Knowles (ed.), *Doing Better and Feeling Worse: Health in the United States* (1977) (also published as the Winter 1977 issue of *Daedalus*). Furthermore, such allied health personnel are much more likely to spend time on patient education and working with patients on preventive measures than are physicians. After all, for many years white doctors have been repeatedly accused of not spending nearly enough time on these subjects with their white middle class patients. It is unlikely that a physician's race would make much different in this attitude. Indeed, it would be unwise for a doctor to emphasize such efforts—vital as they are—inasmuch as his training in other areas, to fulfill duties which only he can perform, would be wasted. Allied personnel and paraprofessionals should handle these tasks, which if well done, will prevent the deteriorations and complications that a physician alone can cope with.

In one experiment, paraprofessionals with only four weeks of training were used successfully to monitor long-term ambulatory diabetic and hypertensive patients, most of them black. Through use of computer-derived "clinical algorithms," also called "problem-oriented protocols," the paraprofessionals were able to determine which clinic patients needed to see a doctor and which could be sent home safely. Only in 1% of the instances was a symptom missed (and that was judged to be an unimportant symptom). This is only one example of how "physician extenders" can function to relieve the doctor's load and render better service. The patients themselves were very satisfied, and especially appreciated the chance to obtain

psychosocial support from the paraprofessionals, with whom they felt free to discuss matters about which they felt reluctant to consume the doctors' time. A.L. Komaroff, *et al.*, "Protocols for Physician Assistants: Management of Diabetes and Hypertension," 290 *New Engl. J.Med.* 307 (1974).

**J. Even Now, Reverse Discrimination Is Polarizing And Balkanizing American Society**

Looking at the Briefs Amicus filed in this case provides a disconcerting glimpse at the possible future of race relations in America.

First, it is ominous that over three dozen Briefs Amicus were filed on behalf of Petitioners, representing many dozens of otherwise respectable and progressive organizations, all saying that a person's entire career and chances for happiness can be consigned to the waste heap because of his race—and this in the interest of social justice! This is a measure of how crooked many people's thinking has become on this issue.

Secondly, the Amici on behalf of Respondent (although not all of them are known to counsel at the time the instant brief is being written)—appear to include representatives of several ethnic groups, such as Polish-Americans and Italian-Americans, and several organizations representing America's Jewish population. Also, there is at least one individual Amicus on behalf of Bakke who is himself a prospective victim of reverse discrimination, since he is now applying to law school: Timothy J. Hoy.

Third, the fact that so many otherwise allied organizations are now filing briefs on opposite sides of this case is but a precursor of the polarization and hate that will develop if the decision below is reversed.

Reversal would indeed lead to the creation—in a different sense from that originally described—of the "two Americas" postulated by the report of the National Advisory Commission on Civil Disorders (the Kerner Commission). That document



presented, as a "basic conclusion," the warning that "our nation is moving toward two societies, one black and one white—separate and unequal." Report of the National Advisory Commission on Civil Disorders 1 (Bantam edition, 1968). In the praiseworthy effort to reverse that trend, we are now creating two different societies in another sense: a collection of rather arbitrarily chosen minority groups whose members are automatically given official and unofficial preferences in various respects, and the rest of us. N. Glazer, *Affirmative Discrimination* 197 (1975).

Exacerbating matters is the fact that the choices of beneficiary groups to receive affirmative action preferences are arbitrary and capricious. *Id.* 198-99.

It is also been pointed out that 98% of Hispanics are white, which raises the question of why they should be favored over other whites. Brief Amicus of Polish American Congress, *et. al.*, 12.

Still another critic has spoken to the same point:

> "Puerto Ricans, Spaniards, Argentinians, and Mexicans are all 'Spanish surnamed.' It is hard to see what else they have in common, or why they should receive different treatment than Portuguese, Brazilians, or Arabs. And it is not obvious that various white 'ethnics' suffered less from discrimination than females did. Yet they are not preferentially admitted, or hired, by affirmative action. These remedies, then, are not only counterproductive and unjust most of the time, but also arbitrarily selective. Perhaps this is a minor defect compared to those already mentioned: if an idea is bad, arbitrary application does not make it much worse. Nonetheless the inherent capriciousness of the scheme and the unavoidable arbitrariness in execution are psychologically repulsive."
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> E. Van den Haag, "Reverse Discrimination: A Brief Against It," *National Review*, April 29, 1977, 492, 495.

Every group will be set against every other group if the decision below is reversed. Each group will say: If there are to be quotas for others, we want ours, too. Indeed, some may claim that the members of certain groups have too large an allotment already. As Professor Sidney Hook puts it, officially institutionalizing reverse discrimination

> "[W]ould be to plunge our nation into turmoil. If we abandon our present approach which is blind to color, deaf to religious dogma, indifferent to sex and national origin where only merit should count, we intensify endemic racial and national conflicts. The struggle for 'proper quotas' among different groups, all vying to increase their quotas, will generate tensions that in time may burst with explosive force. Our pluralist society will become a permanently polarized society."
>
> Hook, "Racial and Sexual Quotas," *New York Daily News,* March 27, 1977, C15.

As a member of the California Court of Appeal bench warns,

> "The weakness of the proportional argument is that quotas, once instituted, cannot logically be limited to one group when other groups exist which are equally entitled to quotas. The next step is a series of quotas. But if minorities obtain quotas, demands from majority groups for quotas are bound to ensue. In short order a full-blown quota system would arise which would necessarily impose restrictions on overrepresented groups in order to assure a student body representative of the general population. A quota policy particularly discriminates against minority groups which have achieved disproportionate representation in a particular field."
> M. Fleming, "The Black Quota at Yale Law School" [letter to Dean Louis Pollak], *The Public Interest,* No. 19, Spring 1970, 44, 47.



At least one Brief Amicus filed so far in this case fulfills this prediction—that of the Polish American Congress, which strongly implies that if there is a reversal in this Court, Polish-Americans would want "their" quota also. *Id.* at 11. Their brief even points out that they and other white ethnic minorities have been here longer than some of the present non-white beneficiaries "who have recently arrived, in some instances not legally. . . ." *Id.* at 13. Professor Amitai Etzioni of Columbia University, the well-known sociologist, predicts where we are headed:

> "There is every reason to believe—indeed, we already see numerous signs of this trend—that this approach leads other status groups to demand their shares. Among the groups recently so activated are gay people, the elderly, and the handicapped. Thus, if having been discriminated against in the past is the basis for preferential treatment, then, in all seriousness, lesbians are entitled to extra consideration since they suffered more exclusion than other women in the past. Southern blacks would have to be given larger quota consideration than northern blacks; first-generation Mexican-Americans more than second-generation, and so on."
>
> Etzioni, "Making Up for Past Injustices: How *Bakke* Could Backfire," *Psychology Today,* August 1977, 18.

The magnitude of the decision in the instant case will carry far beyond the specific question of professional school admissions at state universities tomorrow or even state university admissions in general. Indeed, judging from the comment appearing in the mass media, it would be taken as a bellwether decision that will indicate whether reverse discrimination in diverse sectors of American life is permissable. Admissions to privately run universities, and employment (especially public employment, where equal protection guarantees apply), will be dramatically affected.

So will another area which has received relatively little attention: the extending of preferences to contracting firms owned or administered by racial and ethnic minority group members. Many governmental entities and private corporations offer such preferences, which in many cases, of course, have a seriously disabling effect on other small firms run by non-minority persons. This situation is mentioned in the Brief Amicus of the National Association of Minority Contractors, *et al.*, submitted to the Court in the instant case, at 1. It is also discussed in G. L. Hopkins, "Contracting with the Disadvantaged, Sec. 8(a) and the Small Business Administration," 7 *Pub. Contract L.J.* 169 (1975).

Financial aid to students is another area where preferential treatment is frequently accorded. At the New York University School of Law, for instance,

> "The financial aid policy of the School works on a double-standard. This means there are two different tables mandating the particular ratio of scholarship to loans, one for so-called majority students and one for so-called minority students. . . . The definition of "minority" is set by the Admissions Committee. . . . While the definition to be applied by the school is being reconsidered, for all students now in attendance classification as a minority student as an irrebuttable presumption for Blacks; for mainland Puerto Ricans (not islanders), Latinos and Asian-Americans there is a presumptive minority classification which can be overcome based on 'subjective socioeconomic criteria.' For all other students majority status is presumed, subject to the same socioeconomic determination of minority status. As a practical matter there is little movement across presumptive barriers. One source associated with the Financial Aid Office observed somewhat wryly that s/he believes that a white student of Italian extraction was reclassified as minority student."
>
> *The Commentator* (Student Newspaper of NYU School of Law), April 14, 1977, at 1, 7.



Again we see the arbitrary selection of preferred minorities, with, again, one minority group getting even more preference than the other preferred groups. Such a preferential scheme was invalidated by *Flanagan* v. *President and Directors of Georgetown College,* 417 F.Supp. 377 (D.D.C. 1976). Although the institution covered was a private university's law school (the Georgetown Law Center), the institution had received federal financial aid and was thus covered by Title VI of the Civil Rights Act of 1964, 42 USC § 2000d *et seq.* The federal monies were received for the purpose of constructing the Law Center's building—and this was found to be sufficient to bring the school's practices under the ambit of Title VI. 417 F.Supp. at 383-4. The suit arose because financial aid funds were awarded on a reverse-discriminatory basis by the school. These were its own, not federal funds, but once Title VI coverage was found, that statute barred the school's preferential policies. The court in *Flanagan* expressly held that the defendants' position is "reverse discrimination on the basis of race which cannot be justified by a claim of affirmative action." 417 F.Supp. 384. It went on to explain that:

> "While an affirmative action may be appropriate to ensure that all persons are afforded the same opportunities or are considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing, or financial aid) in favor of one race to the detriment of others." *Id.*, 384.

We submit that the decision in the instant case—which ever way it goes—will have great effects on the behavior of Americans in everyday transactions and decisions, not because of the narrow holding therein, but because, in the popular mind, the instant case is viewed as dealing with the legality of preferential treatment in *any* selective process, wherein only some persons can be chosen and others must be rejected. We believe that, for a large number of Americans indeed, the decision herein will be *the* decision on the legality of such preferential policies and practices.

Actually, in a sense, this could be said to be true, for the instant case presents a fundamental and far reaching challenge to the American tradition. We greatly fear that once the door is opened to allow "affirmative discrimination," there will be no stopping this juggernaut. That is why we must adhere to the wise advice the inventor of that apt phrase has given us:

> "Compensation for the past is a dangerous principle. It can be extended indefinitely and make for endless trouble. Who is to determine what is proper compensation for the American Indian, the black, the Mexican American, the Chinese or Japanese American? When it is established that the full status of equality is extended to every individual, regardless of race, color, or national origin, and that special opportunity is also available to any individual on the basis of individual need, again regardless of race, color, or national origin, one has done all that justice and equity call for and that is consistent with a harmonious multi-group society."
>
> N. Glazer, *Affirmative Discrimination* 201 (1975).

If we insist on violating these strictures, we will reap a whirlwind, which will satisfy no one:

> "The effect of academic affirmative action, or of preferential admissions, on those discriminated for is likely to be unhelpful. There are three possibilities. First, there is the unqualified law student who was preferentially admitted. He will drop out because of low grades which were predictable from his entrance test. He may be worse off than before.
> Second, some preferentially admitted students graduate by dint of preferential grading or undemanding curricula specially fashioned for them. They profit from the credentials obtained. But the group which was to be favored pays a high price: the black college graduate, PhD, or lawyer who graduated because lower standards were applied to him than to his white counterparts is not as competent as



> they are and will reinforce the prejudice which maintains that blacks are necessarily less competent than whites.
> Third, there is the preferentially admitted black student who, despite low entrance scores, actually catches up and does well without preferential grading. Yet he may never know whether he graduated because he was black or because he deserved to. If he does know, others will not: he will suffer from the image perpetuated by his fellow student whose preferential admission was complemented by preferential grading. Similarly, female or black professors hired or promoted because of affirmative action will not know whether they were hired because they were qualified or because they were female or black; nor will others. Those hired because they belong to an under-represented group though they are not the most qualified persons also will perpetuate the image of low competence of the under-represented group—the image that contributed to discrimination against it in the first place.
> The persons excluded because of preferential admissions or affirmative action naturally are no less bitter than those who in the past were excluded by discrimination. Since 'discrimination for' merely reverses 'discrimination against,' it cannot but perpetuate the group hostilities of the past. This applies as well to all enterprises which practice reverse discrimination."
>
> E. Van den Haag, "Reverse Discrimination: A Brief Against It," *National Review,* April 29, 1977, 492, 494-5.

The only possible conclusion is that reverse discrimination is evil, because when we engage in it,

> "we abandon the first principle of a liberal society, that the individual and the individual's interests and good and welfare are the test of a good society, for we now attach benefits and penalties to individuals simply on the basis of their race, color, and national origin. The implications of the new course are an increasing consciousness of the

significance of group membership, an increasing divisiveness on the basis of race, color, and national origin, and a spreading resentment among the disfavored groups against the favored groups. If the individual is the measure, however, our public concern is with the individual's capacity to work out an individual fate by means of education, work, and self-realization in the various spheres of life. Then how the figures add up on the basis of whatever measures of group we use may be interesting, but should be no concern of public policy.

This, I believe, is what was intended by the Constitution and the Civil Rights Act, and what most of the American people—in all the various ethnic and racial groups that make it up—believe to be the measure of a good society. It is now our task to work with the intellectual, judicial, and political institutions of the country to reestablish this simple and clear understanding, that rights attach to the individual, not the group, and that public policy must be exercised without distinction of race, color, or national origin."

*Id.*, 220-1.

### K. Race Is Not A "Bona Fide Occupational Qualification" For Professionals

Numerous briefs filed in this case assert that minority group members who are "consumers" of medical, legal, and other professional services somehow need to receive them from other minority group persons. [18]

[18] As an extreme example of this type of mentality, Martin Goldman, a white historian, was denied numerous college teaching posts because every school with an opening in his field—ironically, the history of blacks in America and other lands—insisted that it be filled either by a black instructor or not at all. Finally, he took action against one of the offending institutions, Temple University, which eventually paid him $5,000 in an out of court settlement. *Wall Street Journal*, July 29, 1974, 10.



These arguments are based in the notion that group identification can be a proper criterion for employment. Because in certain cases this can be true, the Civil Rights Act of 1964, as amended, provides that religion, national origin or sex, *but not race*, can be a "bona fide occupational qualification," usually abbreviated as "BFOQ." § 703(e)(1); 42 U.S.C. § 2000e-2(e)(1). However, the BFOQ concept has—quite rightly—been interpreted narrowly by the Equal Employment Opportunity Commission and the courts, and, in general, covers only such workers as locker room attendants (who should be of the same sex as those who use that facility to protect users' privacy and modesty), actors or actresses (who need to be chosen on the basis of sex for purposes of authenticity in performance) or editors of denominational newspapers (who must belong to the particular faith in order to function properly in such a position).

Professional practice, however, is not such a situation. Skills, not group membership, are the relevant factors. Nor is there a right possessed by patients, or law clients, to be served by their racial or ethnic confreres.

Even if it were assumed that producing more minority professionals would provide a greater number of "role models" for minority youth, the individual right of each applicant for admission to a state-run medical or law school (or for employment as a physician or attorney) *not to be discriminated against* is guaranteed by law, whereas the wish to have numerous "role models" in young people's environments is only a desideratum.

Indeed, while increasing the number of physicians or attorneys from minority groups may be psychologically beneficial for the latter, it can produce a negative impact on those very minorities, the medical profession and the bar, patients and clients of all races, and the community as a whole if these doctors and lawyers are known to have been admitted to medical or law school, and/or hired on the basis of race or ethnicity—because of the stigmatizing effect of reverse discrimination.

The argument is made that preferential treatment is justified because minority group doctors would be more attuned to the subcultures and folkways of their brethren and thus better able to aid them. It would seem that if this argument had any validity at all, it would hold true especially for one particular specialty, psychiatry, because of the tremendous importance of communication between doctor and patient, and the critical need for the doctor to understand the patient's cultural background. But the facts are otherwise.

To quote a black psychiatrist, expressing his strong disapproval of a 1969 student rebellion at Howard University's College of Medicine, when separatist-minded black students sought to increase the school's "blackness,"

> "... there were assertions that a white psychiatrist on the faculty could not teach black students anything about a psychiatric disorder such as schizophrenia. The basic metabolic disturbances which apparently underlie the schizophrenic disease process, and the psychopathologic disturbances which are known to occur in schizophrenics of all ethnic and social class groups, are given modified expressions in various cultural or subcultural settings, but there is not the slimmest evidence that diagnosis or treatment or rehabilitation can be based on a patient's skin color or racial identity. The black student minority claimed that because blacks have suffered through four hundred years of slavery, this has made their minds, mentalities, and personalities inscrutable and impenetrable to all whites. As a psychiatrist, I should like to point out in passing that schizophrenic patients in particular, but by no means exclusively, commonly feel that they are worthless, inferior, different, damaged, downtrodden, misunderstood, and past all hope of meaningful human contact and interchange. I have seen patients with these feelings, I should add, from the most highly privileged social and ethnic groups, some of whom as individuals were even of outstanding potential and attainment. So vehement was



> the shrill insistence that a white cannot teach psychiatry to blacks, that one white faculty member at Howard resigned, after noting that the attitude did not moderate."

J. L. Curtis, *Blacks, Medical Schools and Society* 116-7 (1971).

Dr. Curtis' colleagues agree with him, even with respect to a psychiatric problem that should present a still stronger case for the viewpoint that minority patients need minority doctors: serving the Spanish-speaking patient of low socioeconomic status:

> "although many have been in the United States for substantial periods of time, they often have not learned to speak English. ... One study of patients who showed an unwillingness to learn English revealed that many have difficulty communicating adequately in their native language. They were mistrustful not only of English-speaking doctors, but of Spanish-speaking doctors as well."

R. A. MacKinnon and R. Michels, *The Psychiatric Interview in Clinical Practice* 394 (1971).

The same textbook, in its chapter on interviewing non-English speaking patients through an interpreter, advises that "under most circumstances, the patient will develop a transference [in the technical psychoanalytic sense] to the physician just as if the interpreter were not present." *Id.* at 454.

These writers are well aware of problems caused by the medical folkways of minority group persons. They show how the solution to these difficulties is not to provide a doctor from the same race or ethnic group, but simply to handle the situation in a professional manner:

> "[I]t is common for the lower class Puerto Rican, Cuban, or Mexican patient to feel that his trouble has been caused by evil spirits. Such a belief not only complicates the

problem of diagnosis, but also colors the patient's expectations and motivations in seeking help. The interviewer should not dispute the patient's belief in evil spirits in general, but should advise him instead that his immediate problem is not caused by evil spirits. The patient may already have consulted a spiritualist practitioner who has given the patient conflicting advice. The interviewer should not attempt to debunk this practitioner, but merely indicate the disagreement and support any evidence the patient has offered that corroborates the physician's opinion. If the patient had been satisfied with the spiritualist consultation, he would not be seeing the physician."

*Id.* at 395.

Nor is the rejection of Petitioners' BFOQ allegations limited to mental disorders. In the words of a well-known internist and writer on medical matters:

"Good primary care physicians must understand their patients' cultural backgrounds, and many patients—and physicians—are more comfortable with people of their own background. But one does not have to be of a culture to understand it. Empathy and sensitivity are hardly the opposite of intellectual vigor and ability, and the day-to-day practice of medicine requires a lot of the latter."

M. Halberstam, "A Disservice to Minorities," *American Medical News,* Dec. 13, 1976, Impact section, 2,4.

It is of course necessary to impart that kind of understanding. One effective way of doing so with regard to Mexican-Americans was pioneered by former Chief R. Fred Ferguson of the Riverside, California, Police Department, who recently won an award from the American Society for Public Administration in recognition of his innovations in human



relations training for police officers described in *Law Enforcement News,* June 7, 1977, 8-10.[19] It is submitted that if this kind of teaching and sensitivity training can be accomplished with California municipal law enforcement personnel, it would seem that the medical educators in that state ought to be able to devise an appropriate and at least equally effective program.

Significantly, it should be noted that Chief Ferguson initiated his project after the former chief's efforts at implementing Petitioners' BFOQ notions had failed miserably:

"Before I came to Riverside my predecessor had tried having Mexican-American officers work in the barrio, but it was horrible for the officers and the community. The Anglo policemen perceived that the Mexican officers were letting people off the hook by not enforcing the law. There was a separation at briefing sessions and an alienation within the department. The people of the barrio came down hard on the Mexican officers, saying, 'Hey, we're your kind, how can you do this to us'? It was a very divisive situation both within the department and in the barrio."

*Id.* at 9.

What could have caused this real-life contradiction of Petitioners' ideas?

"We needed some intensive training for men who are working in places where the folks were substantially different from themselves. We learned very quickly that the problem did not exist for just the Anglo officer, since

[19] In brief, the program, developed by a psychologist, an anthropologist and a sociologist, consisted of four hours of instruction per week for ten weeks, plus a field experience. In addition to readings and talks by resource persons, the officers went to a Mexican restaurant and theater. They took a bus tour of the barrio, first with a police officer acting as a guide and pointing out crime scenes and haunts of undesirables, then with a Chicano guide who pointed out the homes of achieving, productive citizens who had overcome handicaps, and cultural and historical sites. *The officers spent three full days and nights living in Mexican-American homes* where they could see first-hand that the stereotypes they had heard about were untrue. *Id.*, 9-10.

the Mexican-American officers were middle class too. A person who has been away from the barrio very long has almost as much to learn as the Anglo."

*Id.* at 9.

This should not really be surprising, since only those who fall prey to prejudice and stereotyped thinking about minorities are unaware that many minority people are decidedly in the middle-classes, with respect to lifestyle and beliefs.

To further demonstrate the fallaciousness of the notion that "You've got to *be* one in order to help one," we can examine a striking example, from California, involving the legal profession. In a murder case an appellate court has held that a judge assigning counsel to represent an indigent defendant should not take the attorney's race into consideration. The defendant, a black man, had been convicted by a jury of first degree murder. Sentenced to death, he appealed, raising among other grounds of alleged error the trial court's denial of his motion for a change of counsel and for a continuance. He contended that race was a relevant criterion for choosing counsel, and that having a white lawyer had prejudiced his rights. In unanimously commuting his sentence to life imprisonment, but otherwise affirming the judgment, the court held that:

"Any limitation of Court appointments based on race or ethnic background has no place in the administration of justice. The right to be free from discrimination is an individual right, and it should not be abridged or modified on the basis of an individual's race or other ethnic factors. The deliberate preference for an individual of one race, and solely because of his race, over an individual of another race, even in cases where the latter individual is better qualified in all other respects, is a grave injustice and an unconscionable violation of constitutional principles of equal protection."

*People* v. *Fitzgerald*, 29 Cal. App. 3d 296, 309-10, 105 Cal. Rptr. 458, 466 (1972).



In this example, of course, the "right to be free from discrimination" under discussion is that of applicants for the post of assigned counsel, not any right of the defendant. However, this decision does not impair the rights of the defendant—it enhances them. His right is to receive competent counsel. The court correctly ruled that race is irrelevant in choosing a good lawyer.

The defendant may have thought that only an attorney of his own race could communicate well enough with him to prepare the most effective defense possible, and to inspire his confidence enough to elicit the necessary cooperation. However, to reiterate, just as some members of one race are especially gifted in communicating with members of another, there are many people—both blacks and whites—who have considerable difficulty relating to and communicating with members of their own race, especially across cultural or socio-economic lines.

Clearly, in choosing the best qualified candidate for the assigned counsel position, a court will want someone skilled and experienced in the practice of criminal law. An obvious ingredient for success in such practice is the ability to engage in a close working relationship with one's clients who—in the case of a criminal lawyer—are often people whose background is very different from that of counsel, even if they are of the same race. Therefore, the legitimate need of a defendant to obtain an attorney who can relate to him and whom he can trust—which the defendant may mistakenly think would be protected by making race a criterion in lawyer selection—will actually be safeguarded automatically if the best-qualified candidate criterion is employed, as required by the *Fitzgerald* decision.

Furthermore, Petitioners and the Amici supporting them fail to realize that the BFOQ argument can be used—if it is accepted—as a double-edged sword. Would it not be equally true that a white doctor or lawyer is better qualified than a

black one to handle cases involving white patients or clients? This view, carried to its logical conclusion, is really an argument for racially segregated medical and legal professions.

In the field of education, similar arguments have been made in favor of imposing a racial BFOQ in selection of teachers and professors (despite the Federal statutory exclusion of race as a BFOQ category). Such a line of thought would lead to a restoration of the segregated educational system struck down by the Supreme Court over two decades ago, in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) and a return to the discredited "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). The Equal Employment Opportunity Commission, recognizing that fact, has soundly repudiated this misguided argument. E.E.O.C. Decision No. 74-106, 10 FEP Cases 269, C.C.H. E.E.O.C. Dec. § 6427 (1974) at n.20. The E.E.O.C., in holding illegal an instance of reverse discrimination against a white professor, approvingly cited *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), where the court flatly rejected the argument of an all-white school board that black teachers should not be hired to instruct white children because of a lack of "rapport." Decision No. 74-106, *supra*, at n.16 and accompanying text. And the New York Court of Appeals, interpreting the equal protection provision of that State's Constitution in a case involving alleged preferential treatment for minorities in appointing school supervisors in a district with a heavily minority enrollment, held that "race or religion cannot, as qualifying factors, constitutionally be considered. . . ." *Council of Supervisory Assns.* v. *Board of Education*, 23 N.Y. 2d 458, 468, 245 N.E. 2d 204, 210 (1969).

Similar considerations would apply to the arguments presented in the Antioch School of Law's Brief Amicus at 12-30, which alleges that race or ethnicity is relevant in measuring "competence."



## L. Professional Schools' Minority Enrollment "Goals" Are Really Quotas

Petitioners' Brief goes to incredible lengths to deny the obvious when it alleges (at 46) that there is no "quota" against whites in the instant case. That statement is absurd. A fixed number of places—usually 16—are set aside each year for the exclusive use of racial minorities. A minority applicant to the medical school seeks one of 100 available places, including approximately 16 a year reserved solely for minorities. A non-minority applicant, such as Bakke, only has the residue—84 places—available to him. (Furthermore, he may well face reverse discrimination even in the competition for those 84 "regular" slots, also, despite any denials by the medical school.) Thus, 16 percent fewer places are open to a non-minority applicant than are open to a minority applicant. Surely this flagrant denial of equal opportunity richly deserves the appellation of "quota system."

Petitioners' Brief, at 45-47, and the American Bar Association Brief Amicus, at 20, both try to draw the same fraudulent dichotomy between quotas (which they admit are impermissible), and "goals" (which they claim *are* permissible). They allege that it was "goals" that were resorted to by the medical school in the instant case. Petitioners' discussion of this point does not attempt to define "goals." But the simple facts are that the medical school discriminates against white applicants and in favor of minority applicants. No amount of circumlocutions or verbal gymnastics by the medical school can obscure or deny that ugly fact—or can in any way succeed in denying the suffering, frustration and utter helplessness of the victims who are now told that their years of diligent effort and sacrifice, and their hopes and ambitions are all to be simply disregarded and turned aside, so that the University can point to a high minority "body count" as evidence of its devotion to social justice.

These goals are not mere innocent targets; they are numbers the attainment of which is sought as an end in itself. Since

a quota is "a share . . . assigned to a group," American Heritage Dictionary of the English Language 1073 (1970), Petitioners' "goals" fit the definition of quota precisely, whether or not a rigid number is set before the admissions process begins each year. *Cf.* Petitioners' Brief, 46-7.

We note that the Secretary of Health, Education, and Welfare has also, in recent public statements, begun to draw what we consider to be this distinction without a difference between goals and quotas. N.Y. *Times*, June 6, 1977, 1; June 9, 1977, A17.

Perhaps the most revealing light on the nature of these "goals" appears in a memorandum dated August 11, 1972 from Martin S. Begun, Associate Dean at New York University School of Medicine, to Dr. Davis G. Johnson of the Division of Student Affairs, Association of American Medical Colleges. Entitled "Legal Considerations Related to Minority Group Recruitment and Admissions," it was apparently distributed at a June 22, 1972 meeting of the Association's Northeast Regional Group on Student Affairs, held at Burlington, Vermont.

The memorandum, which favors preferential admissions, candidly states as follows:

> "Establishing given percentages or quotas of minority students to be accepted in a class represents predictable problems. This should be avoided at all costs. It is possible to achieve the same results without giving the appearance of restricting portions of the class for designated groups."
>
> *Id.* at 9.

Precisely. It is just such attempts at duplicity that underlie the efforts of Petitioners, the Amici in support of them who adopt this concept, and the Secretary of HEW to rely on the false dichotomy between goals and quotas.



Significantly, when this memorandum was published in the *Journal of Medical Education*, the third sentence was deleted. Begun, "Legal Considerations Related to Minority Group Recruitment and Admissions," 48 *J. Med. Educ.* 556, 559 (1973).

Law schools use the same ploy. According to an article on minority admissions in the law schools in New York City:

> "While the representation of minority students at the schools interviewed for this article varies widely from 2 percent at Brooklyn to 12 percent at Hofstra, the deans unanimously denied the use of any quotas for minority acceptance.
>
> In fact, more of the deans admitted having a target number in mind for a desired proportion of the entering class."
>
> R. Hochberger, "Law Deans Divided on Issue of Special Minority Admissions," N.Y.L.J., Feb. 25, 1977, 1, 2.

The process is the same at the Harvard Law School:

> "No one talks about a precise quota, but all the members of the [admissions] committee know that minorities have constituted 12 to 14 percent of past classes. Conducting their discussion in terms of how far down the list to go, they accept enough minority applicants to reach the commonly understood target."
>
> J.W. Foster, "Race and Truth at Harvard," *The New Republic*, July 17, 1976, 16, 20.

Thus, it should be quite clear that, whatever one's opinion of quota systems, it is undeniably evident that Petitioners, and "most professional schools in this country today utilize" these devices. Petitioners' Brief, 14.

**M. Reverse Discrimination Requires Intrusive Governmental Assigning Of Racial and Ethnic Labels**

One further—and especially ugly—aspect of reverse discrimination is that, as the great value of being a member of an officially preferred minority group becomes manifest, various factual questions will arise as to whether a particular person can or cannot justly claim such a status. In what may be only a precursor of what is to come, an arbitrator has ruled that a Nevada engineering company, which had announced a program of preferential treatment in employment for American Indians, could force an alleged Indian claiming a right to such a preference to document his ancestry. Wall Street Journal, June 29, 1975, at 1, col. 5. The frightening similarity to Hitler's Nuremberg Laws is obvious. These Amici believe that such a trend, with all its deeply disturbing implications, must be stopped, and stopped quickly.

Perhaps the best clue as to where Petitioners themselves are headed in this area of ethnic categorization would be their proposed Ethnic Identity Transmittal Form U1605 for new employees, which we reprint, *post,* as an Appendix. The June 13, 1977 covering letter from University Vice President Kleingartner states that the new form was approved by the University's Office of General Counsel, which also had a major responsibility for preparing Petitioners' Brief, thus providing a chilling preview of what is in store, no doubt, for all persons connected in any way with Petitioners' University.

At present, in medical school admissions, the University relies on a form used nationally for applying to medical schools. Therefore, we might profitably take a closer look at this American Medical College Application Service form, described in Petitioners' Brief, 40 n.51 at 41. The version for the 1978-79 entering class asks "what is your racial/ethnic self description?" Spaces are provided for the following responses: black, American Indian or Alaskan native, white, Asian or Pacific Islander, Hispanic (with subdivisions for Mexican/American or Chicano, Puerto Rican [mainland], Puerto Rican [Commonwealth],



Cuban, and other Hispanic.) The next question says: "If you wish to be considered as a minority group applicant designate reason: Ethnic [or] financial [or] ethnic and financial." These questions are not optional; they are to be answered by all applicants.

Nor is this a mere isolated instance. The registration form used by the Law School Data Assembly Service includes an optional "ethnic question," to facilitate the use of race and ethnicity in the admissions process by law schools participating in the Law School Candidate Referral Service. Law School Admission Council, *Law School Admission Bulletin 1976-77,* at 9-10 (1976).

It is also relevant to consider the ethnic question used on the College Entrance Examination Board's registration forms for the Scholastic Aptitude Test and other examinations given by that body for such applicants. The question "How do you describe yourself?" on the 1976-77 form has seven choices: "American Indian, Black or Afro-American or Negro, Mexican-American or Chicano, Oriental or Asian-American, Puerto Rican, White or Caucasian, Other." It is prefaced by the following rather disingenuous statement:

> "The College Board wants its tests and services to be fair and useful to all candidates. Research based on responses to questions 37 and 38 will help the College Board evaluate and improve its tests and services. Your responses will also be reported to your school and to those colleges that accept such information in order to make sure their programs are fair and useful to students of all racial and ethnic backgrounds."
>
> 1976-77 SAT Registration form.

It should be noted that nothing is said about that fact that such information will almost certainly be used to facilitate reverse discrimination. However, in a sense, the statement may

not be deceptive in its effects, since the overwhelming majority of students are probably quite well aware that this is the purpose for which the questions are asked.

One cannot help but wonder what the next step is. There are various possibilities. A black person could be deemed to be anyone with "one-eighth or more of African or Negro blood" or even any "ascertainable" amount of Negro blood; although an American Indian was not considered a colored person in the State of Virginia if he had only one-sixteenth or less of American Indian blood. *Loving* v. *Virginia*, 388 U.S. 1, 5 n.4 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 187 n.6 (1964).

Perhaps, for the immediate future, perpetrators of reverse discrimination in the professional schools admission arena will be content with the kind of questions now asked on the Medical College Application Service form and that used by the Law School Data Assembly Service. Those questionnaires merely ask the race of the applicant without going into fractional parts of his ancestry. Of course, if the decision below is reversed, thus putting the imprimatur of legality on preferential admissions, such programs will inevitably expand and there will be much desire on the part of many applicants to get recognized as minority group persons and receive the benefits flowing from such status. The decision makers, at that point, may find it necessary to adopt more stringent tests to determine just who is a member of what racial group. For guidance in finding the appropriate criteria and applying them, they might well wish to cull literature on the considerable body of experience obtained in such matters in Germany during the 1930s and early 1940s:

> "There are already cases of individuals who redefine themselves in this country for some benefit—the part American Indian who becomes an Indian for some public purpose, the person with a Spanish-surnamed mother who now finds it advantageous to change his or her name; conceivably the black who has passed as white and who may reclaim black status for an educational or employment benefit. We have not yet reached the degraded condition of the Nuremberg laws, but undoubtedly we will have to create a new law of personal ethnic and racial status to define just who is eligible for these benefits, to replace the laws we have banned to determine who should be subject to discrimination."
>
> N. Glazer, *Affirmative Discrimination* 200 (1975).



For additional discussion and more examples on this topic, we respectfully refer the Court to the Brief Amicus of Timothy J. Hoy, Point II.

**N. Reverse Discrimination Is a Racist Concept**

The defenders of reverse discrimination often accuse their opponents of being "racists." However, a look at any dictionary's definition of racism is most illuminating. Contrary to popular belief, that word does not mean "racial hatred." Rather, it means a belief that one race or ethnic group—usually that of the racist—is inherently superior to another.[20] Therefore, it would be quite possible for a person to believe that some particular racial group is inferior to his own, while regarding its members with charity and benevolence.

One reason often advanced for favoring reverse discrimination is that without it, supposedly, the number of minority group persons selected in any competitive process would be minuscule or non-existent. If there are in fact minority candidates who possess the minimum qualifications to be selected, however, to assume automatically that choosing only the best-qualified candidates will reject most of the minority applicants is to assume that these minority group persons are indeed actually inferior, and thus must get some

[20] In addition to the standard dictionaries, this definition also appears in such works as T.F. Hoult (ed.). *Dictionary of Modern Sociology* 262 (1969) and G.A. & A.G. Theodorson (eds.), *Modern Dictionary of Sociology* 329 (1969). True to form, however, Petitioners' Brief accuses their opponents of "racism," at 58, despite the fact that *it is Petitioners* who maintain that minorities cannot gain admission to medical school in any but token numbers under a merit system.

sort of preference if their race or ethnic group is to be represented in the final body of persons chosen. However, that is the essence of racism: to believe that the members of a particular group are or tend to be inferior, even if one does not hate them as a result, but want to do everything possible to ameliorate their lot.

Under the criterion that the best-qualified candidate is to be picked, it is to be expected that since minority group people really are individuals just as anyone else, some will be very well qualified and others will not be. And therefore, it will be expected that under non-discriminatory selection, a goodly number of minority group persons will be chosen on their own merits. Thus, to be a non-racist, one must oppose reverse discrimination. It is true, of course, that the present effects of past discrimination, deprivation and poverty have reduced the number of well-qualified minority people in most fields of endeavor, and may also have kept even some of the most talented from developing their skills to the utmost. But this is the kind of problem that legitimate and proper affirmative action was designed to ameliorate. It is not an excuse for discriminating in favor of a minority person, and against an innocent member of another group.

It is common knowledge that under the best-qualified candidate criterion, minority people have risen to the top in fields such as entertainment and professional sports, and are recognized as superior to their non-minority competitors. If the defenders of reverse discrimination are really saying that the excellence of blacks or Hispanics is limited to these particular areas of endeavor, so that preferences are the only way for them to gain prestige in other pursuits, a more insulting and patronizing form of racism would be hard to imagine.

To quote the president of Boston University:

> "[O]nly a sexist or racist could believe that women or members of minorities are in fact inferior to every one else, and would be unable to compete on an equal basis if judged by performance alone. . . . Rejecting excellence in the interest of women and minorities is in effect a condescending adoption of a lower standard for them."

J. R. Silber, "The Need for Elite Education," *Harper's*, June 1977, 22, 24.



**O. Reverse Discrimination Is Morally Wrong**

One of the philosophical bases of the position of these Amici is found in the writings of Aristotle, who distinguished two different varieties of justice. Commutative (also called corrective or rectificatory) justice prescribes that one who has harmed another by means of a civil wrong, such as a tort or breach of contract, "should compensate the victim in an amount equal to the harm thus caused." The other type, distributive justice, "is designed to distribute the honors or rewards of a society among its members in proportion to their merits." E.W. Patterson, *Jurisprudence* 391 (1953); E. Barker, *The Politics of Aristotle* 363 (Oxford Galaxy, paperback 1962). Clearly, those who espouse preferential treatment are confusing these two kinds of justice. They are applying the principle of rectificatory justice to a situation where distributive justice, which in the Aristotelian scheme corresponds to the merit system, should govern. Despite the fact that our society has indeed done grievous harm to members of minority groups and women, by denying them their rightful opportunities for self-fulfillment, the remedy does not lie in doing the same thing--ironically in the name of justice—to innocent members of other groups.

Another underpinning for our beliefs is found in a concept developed by the late American legal philosopher Edmond Cahn, a professor at New York University School of Law.

Cahn believed that we can ascertain what is just and right only from the "consumer perspective." He contrasted this viewpoint with the "imperial" or "official" perspective. Cahn was not referring to what we now call "consumer protection" or "consumerism." He meant the viewpoint of the *individuals*

affected by the problem involved and by efforts to solve it. Cahn saw that it is always one or more individuals who *consume* the results of the decisions made by officialdom, and that the justice or injustice of governmental decisions (or other authoritative actions) must be assessed from the standpoint of those individuals, not from that of the decision makers.

This way of looking at things, said Cahn, can be compared to the "official or imperial perspective"—that of administrators, bureaucrats, legislators or other decision makers in the public or private sectors. These people, often with the best of motives, tend to ignore, downgrade or violate individuals' interests in order—so they say—to best serve those of "society," or of some governmental or other entity such as a school, association, corporation, municipality or group of persons. That this may often entail cruelty and inflict suffering on specific individuals, with or without visible benefits to the entity involved, is deemed irrelevant by those who take this perspective. At the most, they say, such unfortunate factors must be subordinated to various paramount considerations, which include "the necessity for showing respect for expert judgment and administrative convenience" and "the necessity of leaving certain wrongs, however grievous they may be, to the province of morals." These and other examples of phrases and maxims used to justify injustices to individuals (although they have their proper uses as well) were set forth by Professor Cahn. See E. Cahn, *The Predicament of Democratic Man* 17-42 (1961); E. Cahn, "Law in the Consumer Perspective," 112 *U. Pa. L. Rev.* 1 (1963).

The application of this reasoning to reverse discrimination is obvious. Whether or not it is "true" discrimination is a question that must be determined from the standpoint of the victim, not from that of society in general. Viewed from this proper perspective—that of the true consumer of the act—it is discrimination as injurious and cruel, if not more so, as the original acts of bigotry which we vainly hoped would be halted by the passage of civil rights laws. The victim of any act of discrimination, be he a member of the majority or of a



minority, is truly a consumer of injustice. If he asks a government agency to counteract some decision maker's policy of reverse discrimination, and is rebuffed—perhaps because the policy was implemented at the behest of that same agency—his lot is even more bitter. This particular fate does not befall victims of "traditional" discrimination.

Petitioners here wholeheartedly espouse the imperial perspective, resulting in an obvious coldness toward human suffering. Blithely they opine that "the pursuit of some societal goals unavoidably displaces some individuals." Petitioners' Brief, 55. And even in their confession of what they term the only real basis for objection to their scheme—"a principled concern that 'any legal classification by race weakens a government as an educative force,'" *Id.*, 59 (footnote omitted)—the ranking of governmental problems over individual rights is manifest: it is of no concern to them that their policy seriously harms innocent individuals; they see room for "concern" only on the chance that it might harm government (and of course dismiss even that prospect promptly).

Other instances of explicit adoption of the imperial perspective in Petitioners' Brief include the statement that the only persons who can claim deprivation of equal protection are those who are stigmatized as inferiors by the acts complained of. Petitioners' Brief, 71-3. In the consumer perspective, it feels no different and no less unfair to a Bakke, despite the lack of the technical stigmatization which Petitioners wrongly allege to be a prerequisite for equal protection coverage.

Their adoption of the imperial perspective both with regard to the victims *and the beneficiaries* of the medical school's program displays the same ignoring of what actually happens to real individuals in the real world: "The Davis program is not meant to reward the individuals admitted under it nor to penalize those who have a lessened opportunity for admission as a result of it. The goal is to contribute to the

nation's effort to move to a free and open multiracial society. Unfortunately the objectives of the program cannot be furthered without effect on some individuals." *Id.*, 55.

The remaining text in that sub-point up to the bottom of 57 exhibits the imperial perspective with a vengeance, dismissing Bakke's claims because, in effect, the end justifies the means. Significantly, no real authority is cited on those pages to back up the Draconian views expressed, except for three cases. Two of them, *Morton* v. *Mancari* and *Kirkland* v. *New York State Department of Correctional Services,* we deal with elsewhere. These decisions are seriously misstated in the discussion at 55-7. The third case, *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), is cited at 56, as standing for the statement that "respondent has no constitutional right to receive a medical school education." Close examination of that opinion does not indicate its relevance, or why Petitioners might have thought it in point.

There is little need to quote the huge literature attacking reverse discrimination written by those who align themselves with various philosophies known as "convervatism." The antipathy of conservatives to this particular evil is well known. But it might be worth quoting a liberal spokesman, a young philosopher who wrote an article published in *The Humanist* magazine, about how he became a victim of reverse discrimination when a state university denied him a job so that it could hire a woman (and admitted this fact in writing):

> "Many of my friends, comrades in political philosophy and causes, expressed surprise and dismay over my new found 'conservatism.' The entire affair provoked the following reflections.
>
> Too much of so-called liberal or progressive thinking today is in fact illiberal, unprogressive, and unintelligent. The essence of liberalism has always been concern with the welfare, rights and responsibilities of *individuals qua individuals,* not the masses or classes or other such linguistic



> abstractions. Furthermore, although there has been disagreement among liberals as to what social arrangements might best liberate individual capacities, no disagreement exists with the thesis that illiberal means, means that impose *avoidable* injustices on individuals, cannot achieve just ends.
>
> Therefore, when my letter-writing liberal or radical critics and friends explain that "in social situations no one is truly innocent" or that "power is the name of the game" or that in effect, if one is a white male he is "guilty" of job discrimination because other white males have so discriminated and therefore "reparations" are justified and required—something seems peculiar. We find here no concern for the individual. What the person *did* as a person is irrelevant. His gender and race in some mysterious way render him guilty of offenses and deserving of admittedly unfair treatment. It hardly needs to be said that such proposals are neither liberal nor intelligent much less morally intelligible.
>
> Commonsensically, racial, ethnic, or sexual classes do not seek employment; individuals do. Commonsensically, discrimination is making racial, ethnic, or sexual classifications relevant criteria for jobs in which such criteria are clearly irrelevant to performing the task. As we know, the consequences of making such classifications conditions for employment have been amply and notoriously experienced by individuals who are black, female, Mexican-American, or other. To claim now that these criteria *are* relevant to employment when used to even the score for the "good guys" is literally doublethink. The proposal that such doublethink can serve as a principle of social and economic justice is a classic example of the foolish attempt to secure just ends (equal job opportunity) through unjust means (reverse discrimination). Yet, now we face the specter of a government-administered program trying to accomplish

this impossible feat and thereby perpetuating the very abuses that genuinely progressive people have labored so long to eliminate.

I conclude therefore, that labeling support of Affirmative Action programs of the sort discussed 'liberal' or 'progressive,' is not only mistaken, but slanderous."

L. Nisbet, "Affirmative Action—A Liberal Program?", in B. R. Gross (ed.), *Reverse Discrimination* 50, 52-3 (1977).

## POINT TWO: REVERSE DISCRIMINATION IS NO MORE PERMISSIBLE THAN TRADITIONAL DISCRIMINATION; IT IS PATENTLY OFFENSIVE TO THE CONSTITUTION, RELEVANT STATUTES AND WEIGHT OF JUDICIAL AUTHORITY

### A. Petitioners' Line of Argument on Equal Protection Question is Fundamentally Misleading and Incorrect

Because conventional analysis of equal protection problems talks of "classifications" by race, Petitioners understandably seek to avoid the consequences of their violation of Respondent's rights by characterizing their actions as a "classification" instead of as *discrimination.* These Amici believe that even if Petitioners' actions are regarded as a "classification" on the basis of race, such actions violate the Equal Protection Clause whether they are viewed under the "strict scrutiny" test accorded to "suspect classifications," the "rational basis" test, or some hybrid intermediate test. However, these Amici cannot help but feel that the neutral, nonpejorative label of "classification" is an ill-fitted description for Petitioners' conduct here —a circumlocution that provides them with an undeserved semantic shelter.

When a court analyzes whether a particular instance of differential treatment of persons on the ground of race constitutes a "suspect classification" of such persons, it is really



using a shorthand term, for obviously a "suspect classification" is one that is suspected of possessing some illegal quality. This quality is of course *discrimination.* In the instant case, Petitioners have admittedly discriminated on the grounds of race, but seek to defend such discrimination as serving some higher social good. Thus, in the instant case, *the suspicion has been borne out* at the very start of the analysis that this Court must perform. The "classification" (if such a neutral term must be applied to it) is not merely *suspected* of being discriminatory—it *is* discriminatory. While classification may be neutral, outright race discrimination, is, by definition, not neutral, and is therefore prohibited by the Equal Protection Clause.

To point out this indubitable fact is not to beg the question, for despite it, Petitioners could, in theory, still prevail on the equal protection issue if they could nonetheless show that such discrimination is justified by an appropriate quantum of governmental need. These Amici, as will be shown, believe that, if not unconstitutional *per se,* this instance of race discrimination is unconstitutional unless it could pass muster under the "strict scrutiny" test. Therefore, these Amici respectfully urge that the discrimination here be held invalid unless Petitioners succeed in demonstrating a "compelling state interest." The Federal government was able to do so with respect to its drastic racial discrimination against American citizens of Japanese descent during World War II. *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81 (1943). It is conceivable that Petitioners could try to duplicate that feat now, although the foregoing two decisions have been criticized and are no longer considered good law by many commentators. [21]

[21] Even under a general statutory direction to help the disadvantaged gain civil service employment, a state personnel agency was held to be overreaching its delegated power when it embarked on a course of reverse discrimination in favor of women and minorities. *State Dept. of Administration* v. *Dept. of Industry, Labor & Human Relations,* ____ Wis.2d ____, 252 N.W.2d 353 (1977). Here, of course, there was not even such general enabling legislation. Petitioners' acts were truly arbitrary and capricious.

However, whether this Court applies the "compelling state interest" test, the "rational basis" test, or a hybrid test, none of these could be satisfied by the medical school. There can be no "compelling state interest" to commit racial discrimination in student admissions against any group of applicants to a state university. Nor can such discrimination have a "rational relationship" to the performance of any legitimate governmental function, let alone satisfy any "intermediate" test.

The following hypothetical may clarify matters: Let us suppose that members of religious, racial, or national origin minority group "x" can be shown to have a very high rate of violent criminality involving weapons. Would it be permissible to make them carry official photo-identification cards which would have to be flashed to the police on demand, or to allow the police to frisk members of this group, and enter their homes for "no-knock" inspections, whenever a patrolman thought it appropriate? Obviously not, for despite the involvement of what might well be deemed a compelling state interest (the need to counteract crime) and despite the near-certainty that such dragnet searches would yield significant numbers of switchblade knives, sawed-off shotguns and handguns, Constitutional rights cannot be suspended on the basis of religious affiliation, race, or national origin.

To make the argument stronger, suppose that law enforcement officials pointed out, in defense of such measures, irrefutable statistics showing that the overwhelming majority of crimes perpetrated by members of group "x" are perpetrated against their fellow "x-ists."

Thus, the recommended repressive measures would actually be primarily protecting "x-ists" rather than the general public. Surely, then, it would be urged, these devices would comport with the Constitution, since the supposedly victimized group was being helped rather than harmed by these unfortunately necessary departures from normal Fourth Amendment standards, but these Amici believe that the courts would not be impressed by this argument, and the challenged



scheme would nonetheless be struck down as violative of equal protection guarantees. *A fortiori* then, it is unconstitutional for Petitioners herein to discriminate against members of a particular group without any alleged beneficial effect to that group (except for a vague, and we believe, erroneous, prediction of a "better" society sometime in the distant future, as a result of the reverse discrimination).

We must note that *Korematsu* and *Hirabayashi, supra,* dealt with the persecution heaped by the Government on American *citizens* of Japanese descent, whom it placed in concentration camps during World War II. Despite this fact, and despite the unfortunate history of discrimination against all Asian-Americans in the United States generally, and despite their obvious handicaps with "language barriers,"

Japanese-Americans are now excluded from the Special Admissions Program of the School of Law at the University of California at Berkeley (Boalt Hall), Petitioners' Brief, 43 n.52—which again goes to show (a) how arbitrary and capricious these programs are, and (b) how even minority people can be victims of reverse discrimination when the perpetrator decides that they are second-class rather then first-class minorities. [22]

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[22] Neither Petitioners' Brief, *id.*, nor the Law School Deans' Brief on Certiorari, at 25 n.8, in mentioning the reduction of Asian slots in the Boalt Hall admissions quota scheme, describes the frantic efforts of the Asian-American Law Students' Association there to save as many quota seats as possible for their own brethren. Univ. of Calif. at Berkeley School of Law, "Report on Special Admissions at Boalt Hall after *Bakke*," Appendix G: Admissions Committee Report on Asian Minority Admissions (1976).

These efforts belie Petitioners' facile rejection, at 43 n.52, of the California Supreme Court's all-too-true observation quoted there: "[H]uman nature suggests that a preferred minority will be no more willing than others to relinquish an advantage once it is bestowed." 18 C.3d at 62.

A noted scholar supplies another example:

> "The inequalities created by the use of these categories became sharply evident in 1975 when many private colleges and universities tried to cut back on special aid for racially defined groups, who did indeed include many in need, but also included many in no greater need than "white" or "other" students. But the creation of a special benefit, whether

There is an additional insight that can be gleaned from the *Korematsu* case—an insight into the ominous implications of an affirmance by the Court of the decision below. In *Korematsu*, the petitioner, an American citizen, had been convicted of violating a 1942 military order which directed that all persons of Japanese ancestry were to be excluded from a certain area in the Western United States, and the Court affirmed the conviction. In his dissent, Mr. Justice Jackson explained why he believed that the Court's decision was more pernicious than the discrimination by the Executive Branch which had led to the litigation.

Since that case involved the Federal Government, it was the Due Process Clause of the Fifth Amendment rather than the Equal Protection Clause of the Fourteenth that was at issue, but the Constitutional standard was—and still is—the same. *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 n.2 (1975). We therefore commend to the Court Justice Jackson's words:

> "Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The

needed or not, is not to be given up easily: Black students occupied school buildings and demanded that the privileges given on the basis of race be retained. This is part of the evil of the creation of especially benefited ethnic and racial categories." N. Glazer, *Affirmative Discrimination* 199 (1975).



> principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case."

323 U.S. at 245-6. (footnote of dissent omitted.)

We respectfully direct the Court's attention to a serious problem concerning the decision below: it is *favorable* toward reverse discrimination in that it leaves open the door for Petitioners or any other perpetrators to justify such actions on the ground of "necessity" in the future. It should have barred the use of preferential admissions absolutely. Even the proponents of these programs object to the "uncertainty, turmoil and confusion" which will inevitably stem from this aspect of the ruling below. Law School Deans' Brief on Certiorari, 31. Although *this time* the perpetrators have not met their "burden" imposed by the court below of justifying their reverse discrimination, 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693, who knows what the future will bring? Certainly others will try desperately, through bigger and better "Brandeis briefs," and endless parades of witnesses, to meet this burden. Only this Court can prevent such situations from arising repeatedly.

Furthermore, such litigative activities may not be limited to perpetrators of reverse discrimination. Others may come forward to prove "compelling state interests" that excuse "traditional" discrimination against some minority group.

It would seem that the Court should thus affirm the decision below, with appropriate modifications, so as to permanently "close the door" on the possibility of justifying the kind of scheme under review here.

**B. The Authorities on the Equal Protection Aspects of Reverse Discrimination—Including Many Cited By Petitioners—Support Respondent's Position**

Most cases dealing with the validity of voluntarily-instituted racial preferences have concerned employment. Characteristically, such decisions have invalidated voluntarily-instituted preferential treatment in government employment for minorities when these were challenged on equal protection grounds. *Cramer* v. *Virginia Commonwealth Univ.*, 415 F.Supp. 673 (E.D. Va. 1976) (preferential treatment for women); *Anderson* v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D. Cal. 1972); *Brunetti* v. *City of Berkeley*, ___ F.Supp. ___, 12 FEP Cases 937, 11 EPD ¶ 10,804 (N.D. Cal. 1975); *Hiatt* v. *City of Berkeley*, 10 FEP Cases 251, 9 EPD ¶ 9969 (Cal. Superior Ct., Alameda County 1975); *Krajco* v. *State Bureau of Personnel*, No. 148-037, ___ FEP Cases ___, 13 EPD ¶ 11,602 (Wis. Circuit Ct., Dane County, Feb. 4, 1977); *International Ass'n of Firefighters, Local 134* v. *City of Atlanta*, 11 EPD ¶ 10,676 (Ga. Superior Ct., Fulton County 1975); *Chmill* v. *City of Pittsburgh*, No. 1047 C.D. 1976, ___ Commonwealth Ct. ___, ___ A.2d ___, 15 FEP Cases ___, ___ EPD ¶ ___, slip op. at 12 (Pa. Commonwealth Ct., July 15, 1977). [23]

Petitioners' Brief, at 66-67, cites *Porcelli* v. *Titus*, a Fourteenth Amendment case, as authority for upholding the voluntary minority preferences in the instant case. Such reliance is misplaced. The Court of Appeals' decision there

[23] Other cases invalidating reverse discrimination in employment, but not on Fourteenth Amendment grounds, include *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761 (E.D. La. 1976); *Jackson* v. *Poston*, 40 A.D. 2d 19, 337 N.Y.S. 2d 108 (3d Dep't 1972); and *Fraternal Order of Police* v. *City of Dayton*, 35 Ohio App. 2d 196, 301 N.E. 2d 269 (1973).



quoted approvingly the District Court's finding of fact that "there was no intention on the part of the Newark School Board to discriminate against white persons or exclude them from positions," or "to appoint Negroes in numbers proportional to the school population." Rather, the Board sought to "obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population." 431 F.2d 1254, 1257 n.4 (3rd Cir. 1970).

Another case cited by Petitioners shows great judicial sensitivity toward the gross inequities involved even in court-ordered remedial preferences. In *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir., *en banc* 1971), *cert. denied*, 406 U.S. 950 (1972), the court, while imposing a remedial preference, nonetheless decried preferential treatment (452 F.2d at 330), struck a provision of the District Court's decree ordering an absolute minority remedial preference (at 331), termed its own less drastic relief a non-quota system because of its temporary nature (at 330), and stated that such relief would not "necessarily result in hiring less qualified minority persons" (at 331). (The Court of Appeals ordered that one out of each three firefighters hired be minority group members until twenty of the latter had been added to the Minneapolis Fire Department.) [24]

[24] Petitioners' Brief, at 67, raises some confusion by citing decisions such as *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 422 F.2d 159 (3d Cir. 1971) *cert. denied*, 404 U.S. 584 (1971). In no way does that line of cases constitute authority for the blatant discrimination here. The numerical goals upheld by *Contractors Association* had been imposed under Executive Order 11246 in a situation replete with prior discrimination by the six construction unions involved, which had excluded blacks. 422 F.2d at 173.

Furthermore, the goals, according to the Court, could be met "without adverse effects on the existing labor force" which was essentially transitory and often in short supply for key trades. *Id.* at 176. Not only was no preferential treatment authorized or required under the so-called "Philadelphia Plan," but the Plan itself provided that any discriminatory usage of numerical goals was to be the subject of sanctions by the Department of Labor. *Id.* at 164. As the Plan puts it, "[t]his commitment [to establish and meet goals] is not intended and shall not be used to discriminate against any qualified applicant or employee." *Id.*

The foregoing discussion also applies to other cases upholding state-imposed construction worker plans modeled on the federal effort in Philadelphia, such as *Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st

In connection with the Fourteenth Amendment aspects of the instant case, Petitioners must be reminded that despite their alleged good motives, "the point is not one of motives but of Constitutional authority, for which the best of motives is not a substitute." *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 420, (1935).

Petitioners' position is afflicted by an utter lack of Constitutional authority for its evident belief that minority groups possess a right to a greater amount of representation, if not proportional representation, in medicine, and that this right can be enforced by reverse discrimination. *The cases dealing with preferential treatment in public employment* (which is subject to the Equal Protection Clause) *sharply contradict what appears to be an assumption on Petitioners' part that the proportion of minorities in the medical profession should ultimately mirror, or at least come much closer to, the percentage of minorities in the nation's—or California's—population.* This is certainly *not* the law with respect to public employment. *NAACP* v. *Allen,* 493 F.2d 614, 618 (5th Cir. 1974); *Mims* v. *Wilson,* 514 F.2d 106, 109 n.5 (5th Cir. 1975); *Commonwealth of Pa.* v. *Glickman,* 370 F.Supp 724, 731 (W.D. Pa. 1974).

*Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), a school segregation case cited by Petitioners and others as authority for racial consideration in fashioning a remedy for prior discrimination and its effects, accords with the cases just cited. Under the heading "Racial Balances or Racial Quotas," Mr. Chief Justice Burger stated, "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we

Cir. 1973), *cert. denied,* 416 U.S. 957 (1974) and *Southern Illinois Builders Ass'n* v. *Ogilvie,* 417 F.2d 680 (7th Cir. 1972). Such cases, however, tend to stress the correcting of prior discrimination through preferential remedies, unlike *Contractors Association,* thus ignoring one of the essential points in the latter case: "the Executive is bound by the express prohibitions of Title VII." 442 F.2d at 171-72. Under Title VII the Executive thus cannot impose reverse discriminatory "remedies."



would be obliged to reverse." 402 U.S. at 24. If the Court rejects quotas in a public school situation where no pupil and no teacher will lose a place for racial reasons, there is all the more reason for it to reject Petitioners' flagrantly discriminatory quota scheme.

Petitioners also cite other decisions approving race-conscious remedies for desegregating and improving racial balance in public schools, such as *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973) and *Offermann* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967). These cases are not controlling, for there the issue was what school a child would be assigned to, not whether he would be allowed to attend school at all. In the instant case, Petitioners' conduct constituted discrimination because it was exclusionary toward Respondent, rather than a mere rearrangement; and Petitioners' efforts to equate the two are most unconvincing. (Neither are their efforts to show, at 74-5 of their Brief, that the Court's use of the rational basis test in these and similar cases is authority for the use of that test [instead of the strict scrutiny standard] in the instant case.) [25]

Petitioners allege, at 65-66, that some school desegregation cases are authority for justifying a kind of employment discrimination which Petitioners seek to analogize to their own conduct toward Respondent. The analogy is false. Not only are black teachers as well as whites liable to be affected by any such court-ordered remedial actions (which of course are simply one variant of court-ordered preferences to correct past proven discrimination), but—as has been explicitly held—faculty hiring during desegregation must in all cases adhere to the merit standards which Petitioners deliberately

[25] Although we can at least understand Petitioners seeking to analogize the Court's desegregation decisions to the very different situation at issue here, we believe that the N.A.A.C.P.'s Brief Amicus (at 5 *et seq.*) and the American Bar Association's (at 18) are seriously overreaching when they brand the instant controversy respectively, as one *dealing with* "integration" or "desegregation."

reject in their special admissions concept. *Carter* v. *West Feliciana Parish School Bd.*, 432 F.2d 875, 878-9 (5th Cir., 1970).

With respect to Petitioners' heavy reliance on *United Jewish Organizations* v. *Carey*, ___ U.S. ___, 51 L.Ed. 2d 229 (1977), we wish to emphasize that the mere fact that a Supreme Court decision deals in some way with reverse discrimination does not *ipso facto* make it dispositive of the issues involved in the instant case. *United Jewish Organizations* is simply not in point.

It arose under the Voting Rights Act, a specific statute which deals with a very different matter form professional school admissions.

Under the decision, no one loses his vote entirely. Each person's individual right to cast a ballot is preserved. In short, in *United Jewish Organizations*, individuals' rights are preserved, but in the instant case, the individually possessed right to be free from racial discrimination in the admissions process of a state medical school was *lost* by Bakke.

In the voting case, the plaintiffs sued because they wanted their "group rights" to be the same as those of other groups. In the instant case, however, Bakke sued merely to vindicate his *individual* rights, which had been grievously violated. *The instant litigation concerns individual rather than group rights.* Petitioners are wrongly alleging that some people have "group rights" which cancel out others' individual rights.

Furthermore, the *dilution* of the "group voting power" of plaintiffs in *United Jewish Organizations* cannot be compared with the *exclusion* of an individual from the medical school in the instant case.

Since there is no "opinion of the Court" in *United Jewish Organizations*, there is no authoritative exposition of the reasoning relied on by the majority of the Justices. For that reason, it



would be best to limit the holding of *United Jewish Organizations* to the specific facts therein. However, the concurring opinion of Mr. Justice Brennan, 51 L.Ed. 2d at 248-54, does provide an eloquent statement of some strong arguments U.S. its supposed beneficiaries. 51 L.Ed. 2d at 250-51. And the conclusion to the dissenting opinion of Mr. Chief Justice Burger contains some illuminating comments on the general problem. 51 L.Ed. 2d at 258-9.

*Morton* v. *Mancari*, 417 U.S. 535 (1974) cited by Petitioners, deals with a political, not a racial preference; those American Indians who are not members of Federally recognized Indian tribes would not qualify for the preferred status. 417 U.S. at 553 & n.24. *Morton* may be said to hinge on the *sui generis* status of Native Americans, and the Government's unique trusteeship obligation toward them.

The Brief Amicus of the National Association of Affirmative Action Officers makes but a single point: that under *Arlington Heights* v. *Metro Housing Corp.*, ___U.S. ___, 50 L.Ed. 2d 450 (1977) *and Washington* v. *Davis*, 426 U.S. 229 (1976), the preferences in the instant case must be upheld absent proof of racially discriminatory intent or purpose which, the National Association urges, is not found here.

But by that standard, the preferential scheme at issue must be invalidated. There is no need to prove discriminatory intent, since it has been admitted by Petitioners. The confusion evidently afflicting the National Association is that the discriminatory intent, according to Petitioners, is being exercised for a noble end. As does Petitioners' Brief, the National Association's Brief is caught up in a semantic muddle with respect to the true meaning of the word "invidious." Petitioners, and the National Association, are convinced that since their actions are not motivated by hatred for whites, they are *ipso facto* absolved of culpability for discrimination under the Equal Protection Clause. That, we submit, cannot be so.

### C. Petitioners' Quota System is not a "Remedial Classification"

The university says its actions are justified because they constitute a "remedial classification." We, however, believe that their scheme is no remedy for anything, and is indeed a wrongful act requiring a remedy of its own. These policies are, however, actions rationalized as allegedly promoting social justice. But that, of course, is a familiar excuse for discrimination. Almost all the discriminatory acts brought before this Court could be thus defended, and indeed were. The problem is that some people have very peculiar notions indeed of what social justice is. The thrust of policies like those of Petitioners is:

> "... toward the homogenized society in which all are absolutely equal, and yet the means of attainment is to be a special group identity. We are all to be made identical by treating various interest groups in non-identical ways, giving some privilege and discriminating against others."
>
> G. Roche, *The Balancing Act: Quota Hiring in Higher Education* 72 (1974).

Thus, Petitioners, secure in the belief that they are "on the side of the angels," move forward in their scheme of "affirmative discrimination," which they defend with the "double standard" philosophy pervading their Brief. And so, while Petitioners concede that "the existence of the Davis program diminishes the chances that Respondent, and those in his position, will attain admission," "[I]t is diminution, not exclusion, which is the issue, and the diminution is both marginal and similar in effect to a host of other factors beyond the control of an applicant that reduce the odds of admission." Petitioners' Brief, 54. This overlooks the fact that a "diminution" of a *black's* chances to enter a school, because of a quota system, would still be exclusionary toward that person, and thus discriminatory in the legal sense, rather then mere *damnum absque injuria*.



Petitioners hasten to assure whites that the quota systems at Davis and elsewhere "do not even significantly reduce the number of whites" in medical schools, *id.*, 54, and insist whites cannot complain that they "have been denied an adequate representation." *Id.*, 79. But the point is not whether *any* group *qua* group is represented adequately or inadequately; rather, Petitioners keep forgetting that the rights guaranteed by the Fourteenth Amendment are *individually and personally* held and possessed. *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948), and cases there cited.

Respondent is claiming only his personal, individual right to be free from discrimination; he is not claiming a "Constitutional right to receive a medical school education." Petitioners' Brief, 56. Of course, neither whites nor racial minorities have such a right. But all Americans, however, share a Constitutional right *not to be denied* a medical school education on racial grounds. The philosophy of Petitioners—that an American must now be accorded a *variable* quantum of protection from the Equal Protection Clause (or, as with Bakke, none at all), depending upon which race he belongs to—is simply an abomination and we respectfully urge that this Court decisively reject it.

Arguments have been presented in this case, by certain Amici Curiae, that the legislative history of the Fourteenth Amendment allows "race-conscious" and "color-conscious" measures and "remedies" for prior discrimination. These measures, it is argued, can extend to virtually anything supposedly done to "equalize" the condition of one of the preferred groups here: blacks. But the Fourteenth Amendment is not limited in its wording. It says that *no person* may be denied the equal protection of the laws. There is no reference to blacks or non-whites as being the only persons protected.

Petitioners' Brief, at 57, maintains that the criteria enunciated in *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, *rehearing denied en banc* 531 F.2d 5 (2d Cir. 1975), *cert. denied*, ____ U.S. ____, 50 L.Ed. 2d 84

(1976) would be met by the racial preferences in the instant case. That is untrue. Under the two-pronged test laid out in *Kirkland*, in order to justify a court-ordered "remedial" quota, *first*, there must have been a "clear-cut pattern of long-continued and egregious racial discrimination" and *second*, the effect of any reverse discrimination stemming from the proposed court-ordered quota must not be "identifiable," *i.e.*, not be visited upon a relatively small ascertainable group of non-minority individuals. 520 F.2d at 427.

In this case, there was no prior history of discrimination at the Davis medical school. Petitioners' attempt to use the prior discrimination against minorities in other aspects of society, in California and elsewhere, as an excuse for imposing their quota system, is obviously a tactic that would destroy this criterion, if allowed to succeed. Only discrimination by the actual perpetrator upon whom the court-ordered quota is being imposed would satisfy this first prong of the *Kirkland* test.

As for the second half of the test, it would certainly seem that applicants for medical school are not members of the public at large. While persons taking a test for a state correctional officer's position—to enter the public service—would very often not have invested any prior time and effort in preparing for this particular kind of work, it is obvious that a person wishing to go to medical school must, from his earliest college days, choose courses that satisfy the pre-medical requirements and do superbly well in them. Because of the uniquely intense, protracted and tortuous path to a college degree wherein the course work has satisfied the requirements imposed by medical schools, and met the high academic standards that such schools impose on applicants, it is undeniable that the victims of reverse discrimination in medical school admissions do indeed comprise an ascertainable group. They cannot be classed with college graduates in general, because of the travail necessary not only to obtain the necessary background in the required course work, but also to do better than other students taking such courses.



Furthermore, such students make great sacrifices. They necessarily forsake opportunities to prepare for other professions, where they might have a better chance of entry into post-baccalaureate educational programs. They try desperately to obtain summer jobs in hospitals, clinics, laboratories and other places where they can get practical experience and training in their college years. They probably work harder during college than do those headed for any other profession. The exact sciences, which they must master, demand many hours of intensive study. Extra-curricular activities which would bring them much cultural enrichment and pleasure must also be ignored because of the need to concentrate on their books. And, it must also be noted, for large numbers of these students, everything we have said holds true for their high school as well as their college years. Many of them decide to go into medicine relatively early. They then try desparately to do very well in high school so as to justify admission to a selective college, and to get a "head start" on the other would-be medical students of the future, with whom, they know full well, they will be locked in a rigorous and withering competition. To a certain extent, all this was true before the advent of rampant preferential admissions favoring members of selected minority groups. Now, of course, as non-minority applicants and applicants who are members of non-favored minority groups realize, they are not to be given an even, fair chance to be judged on their merits, the competition having become much worse.

Thus, under the *Kirkland* test, it is undeniable that the program of the Davis medical school violates the guidelines so wisely set up by the U.S. Court of Appeals for the Second Circuit in an effort to stem the abuse of the court-ordered remedial quota. And the actions of the medical school certainly merit the condemnation heaped by the *Kirkland* court on the concept of reverse discrimination:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." 520 F.2d at 427.

It should be noted that another recent decision has embraced the *Kirkland* test. *Lige* v. *Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976).

While these Amici do not accept uncritically the idea that past employment discrimination automatically deserves a remedial quota, preferring other remedies to prod reluctant employers (such as the contempt power, appointment of a special master to supervise the selection process, or mandatory legitimate affirmative action), the issue of course does not arise in this case.

**D. Reverse Discrimination's Victims Cannot Take Political Counteraction**

Petitioners blithely offer assurances that Respondent and his fellow victims of reverse discrimination can quickly and easily stop the onslaught of this phenomenon by "recourse to political processes to protect themselves," and thus forfeit any Fourteenth Amendment shield. Petitioners' Brief, 72. But is this really true? Professor Nathan Glazer answers this question in the negative. Although he was writing in the context of preferential treatment in employment, rather than admissions to professional schools, we believe his remarks are most germane:

> "A policy that is proposed as being for the benefit of the black, for the redress of his situation, for the correction of a monumental wrong, carries enormous moral authority. This authority means that the individual action proposed, unless one is personally closely affected, is not really closely examined; it is assumed that what is proposed is right and can only be opposed from an inferior moral position or an actually immoral one.
>
> * * *
>
> The moral advantage is, of course, not everything: It is as important to consider how the American political system works if we are to understand why measures opposed by



> most people nevertheless become the law. Howard Sherain has argued that Congress has never assented to goals and timetables in employment, either in the Civil Rights Act of 1964 or in the extension of its powers in 1972. Why then do we have goals and timetables? Because Executive authority is, in large measure, independent of Congress, and it would be extremely difficult for Congress, even if it acted and thought as one man—which it does not—to regulate Executive authority. It is, however, also extremely difficult, as we know, for the President to regulate Executive authority. President Nixon said in 1972 that he was against quotas, but his agents operated to impose them with ever greater force.
>
> * * *
>
> The long and short of it is that the Chief Executive can only hope to be effective on a *few* matters, and he chooses not to dissipate his energies on quotas. . . . It would give him little political advantage and make him many enemies. On any given issue, there is a group of interested parties for whom that issue is everything, and a group of interests for whom that issue is only one of many concerns. For civil rights groups, the questions of affirmative action . . . are everything—every effort will be made to achieve success. For those who oppose them, such questions are not everything. Business has other interests, labor has other interests, mayors and voters have other interests. A small group for which one issue is everything may overcome a large group for which the issue is only one among many.
>
> * * *
>
> [T]he President who acts against the supporters of strong affirmative action in his bureaucracy will not only earn the fierce antipathy of a small but deeply committed group, but a milder disapproval from the broad mass of educated opinion. He will gain strong approval only in the South

(and a conservative President, who might want to moderate strong affirmative action, probably already has the South) and among small circles of principled conservatives and liberals with little influence."

Glazer, *Affirmative Discrimination*, 207-12 *passim*, (1975).

The foregoing relatively brief quotation cannot impart the richness of the sophisticated sociological analysis in Dr. Glazer's book, which we commend to the Court as one of the finest analyses of these questions ever to appear.

In addition to the reasons cited by Dr. Glazer, reverse discrimination is not actually perpetrated against all members of the so-called majority group simultaneously. For this reason alone, it is hard for those opposed to such discrimination to build a strong constituency and a powerful pressure group.

Then, too, we need but look at the decision makers in the instant case, and in professional school admissions generally, to see why it is so difficult for the Bakkes of our country to fight this rampant denial of their 14th Amendment rights. How can they possibly have any political control over the actions of admissions officers, deans, and regents of a state university?

It is thus quite clear that, by Petitioners' own announced and chosen standard, Bakke is within the ambit of the Equal Protection Clause: in actual practice, regardless of the hypothesizing of Petitioners, Bakke and the group that he represents do not have political control of the situation, nor can they be expected to acquire such control in the future. [26]

[26] Ironically, reverse discrimination creates a major political problem for minorities as well as whites. It is an obstacle to progress in eliminating the "traditional" discrimination still perpetrated against racial-ethnic minorities and women. Since it is almost impossible for the general public to grasp the fact that those groups are still being hurt by bigotry, inasmuch as massive preferences are openly being accorded to them not only in professional school admissions but also in such areas as educational financial aid and employment, many whites have trouble seeing any need for civil rights progress and other legitimate measures that would aid minorities.



## E. Petitioners' Discriminatory Policies are Illegal Under 42 USC § 1981 and Title VI of the Civil Rights Act of 1964

Although the Equal Protection Clause of the Fourteenth Amendment is the only provision of law involved in this case, it would seem that Petitioners' racial discrimination also violates two Federal statutes.

First, Title VI of the Civil Rights Act of 1964, 42 USC § 2000d *et seq.*, which prohibits racial discrimination by recipients of Federal financial assistance. Petitioner, like other American medical schools, evidently receives such assistance and would thus be covered by Title VI. The Brief Amicus of National Urban League, *et al.* on Certiorari, at 25, asserts the existence of such coverage. [27]

Second, 42 USC § 1981, which, since it prohibits racial discrimination in admissions to private educational institutions, *Runyon* v. *McCrary*, 427 U.S. 160 (1976), should certainly do so with respect to state-run schools. The statute was held to protect whites as well as blacks in *McDonald* v. *Santa Fe Trail Trans'n Co.*, 427 U.S. 273 (1976):

> "Our examination of the language and history of § 1981 convinces us that § 1981 is applicable to racial discrimination in private employment against white persons." 427 U.S. at ——, 49 L.Ed. 2d at 504.

While that case of reverse discrimination did not arise in an affirmative action context, a Federal district court had previously held that a white student who had been refused consideration for a position in a large firm's Summer Internship Program for minority students had a valid cause of action under

[27] In *Flanagan* v. *President and Directors of Georgetown College*, 417 F.Supp. 377 (D.D.C. 1976), the provision of Federal financial assistance in constructing the Georgetown University Law Center's building was held to have brought the school's practices under Title VI. 417 F.Supp. at 383-4. The court held that reverse discrimination in awarding this private institution's own financial aid funds was violative of Title VI.

§ 1981. *Hollander* v. *Sears, Roebuck & Co.*, 392 F.Supp. 90 (D. Conn. 1975). Sears had operated this program as an affirmative action measure to obtain more minority workers.

Although Bakke did not sue under these statutes, they are representative of Congressional intent as to the norms which should be observed in situations such as the case at bar. And they will surely be resorted to by plaintiffs in future reverse discrimination cases.

A further strong indication of Congressional intent on that issue can be found in the recent Federal legislation, previously mentioned, which forbids the Secretary of Health, Education, and Welfare to force racial admissions quotas on institutions of higher education as a condition of their receiving Federal funds. 20 USC § 1232i(c).



## CONCLUSION

Reverse discrimination, through the semantic sophistry of labelling a quota for minorities as a "goal," has excluded Respondent Bakke from his rightful opportunity to enter the Medical School at the University of California at Davis.

The California Supreme Court recognized this and acted accordingly, declaring the practices of Petitioners illegal.

However, while the decision below should be affirmed, it should be *modified* to preclude a future resort to any effort at justifying reverse discrimination by submitting "proof" that it is necessary to accomplish some social goal.

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*Of Counsel:*

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JOHN CANNON
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EDWARD H. DOWD

August 9, 1977

INTERNAL CORRESPONDENCE

UNIVERSITY OF CALIFORNIA SYSTEMWIDE ADMINISTRATION

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Office of the Vice President--
Academic & Staff Personnel Relations

BERKELEY, CALIFORNIA 94720

June 13, 1977

CHANCELLORS
LABORATORY DIRECTORS

Dear Colleagues:

My staff has recently completed revisions of the Ethnic Identity Transmittal Form U1605 for new employees (copy attached). These revisions were made in response both to comments from campus personnel regarding last year's ethnic resurvey, and to changes in federal regulations. The revised form is to be used for new employees. Some of the major revisions are as follows:

1. Reduction of the number of Asian sub-categories by combining other Polynesian, Southeast Asians and other Oriental into one sub-category.

2. Relocation of Pakistani/East Indian to the Asian category, from White, to conform with the change made by EEOC (Federal Register 4/4/77).

3. Deletion of the term "Native Americans" from the American Indian category.

4. Simplification of the explanation of ethnic categories, which is now printed on the reverse side of the form.

5. Addition of employee name as a second identifier to replace the social security number.

6. Clarification of the "Purpose" and "Responsibilities" sections, and inclusion of the additional responsibility for supervisors to inform the employee of the ethnic identity assigned, in those cases where the supervisor completes the form.

These revisions were reviewed and approved by the Office of General Counsel, Payroll, Information Systems, and a small task group of Campus Affirmative Action Staff.

CHANCELLORS
LABORATORY DIRECTORS

June 13, 1977

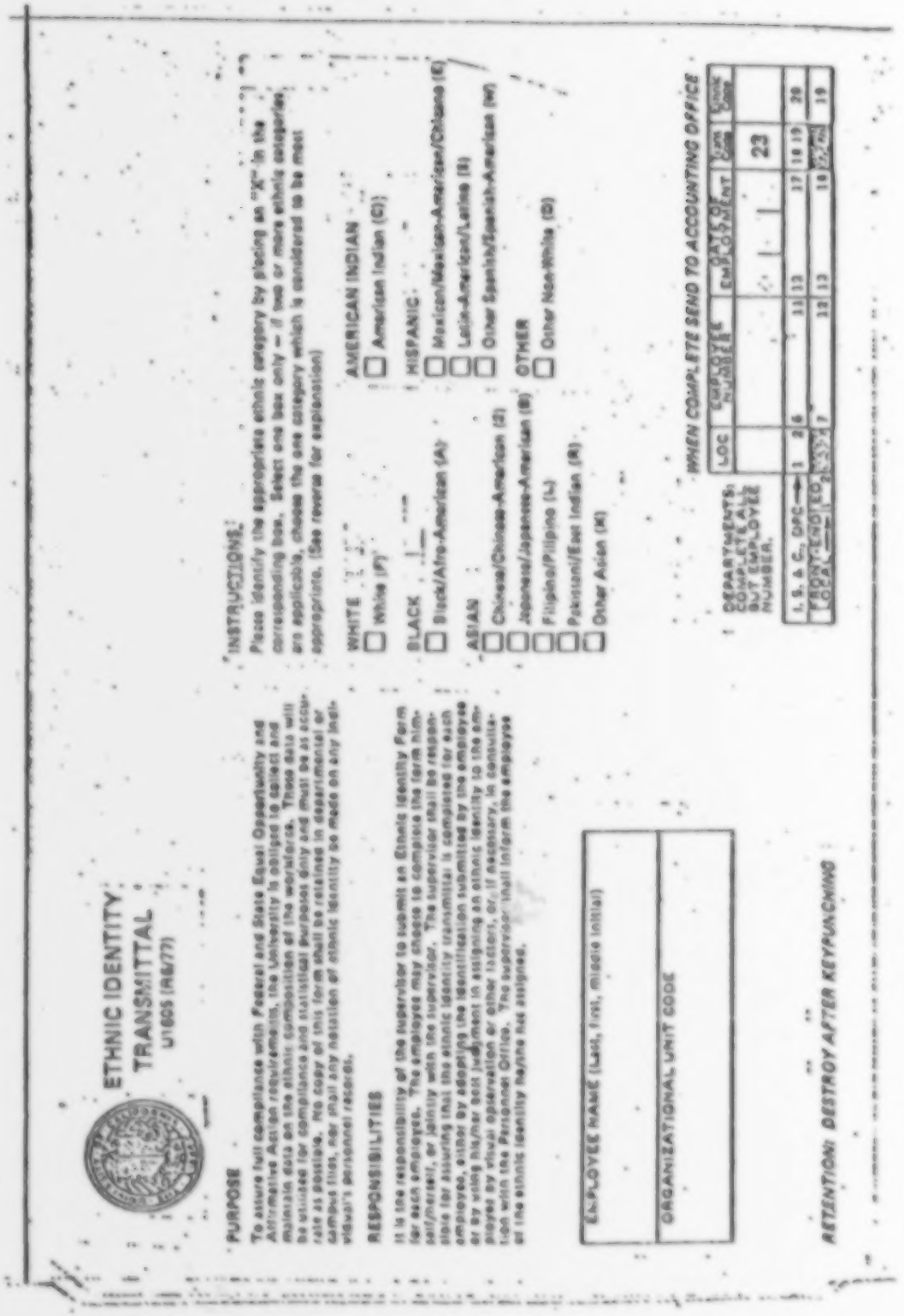
May we please have any comments you care to make by July 1, 1977. We plan to have the revised form printed for use in July. If you have any questions, please call Executive Assistant Strong's office, 2-1317.

Sincerely,

Archie Kleingartner
Vice President

Attachments

cc: President Saxon
Executive Assistant Strong
Affirmative Action Officers/Coordinators



ETHNIC IDENTITY TRANSMITTAL
UCOS (R6/77)

INSTRUCTIONS:
Please identify the appropriate ethnic category by placing an "X" in the corresponding box. Select one box only – if two or more ethnic categories are applicable, choose the one category which is considered to be most appropriate. (See reverse for explanation)

WHITE
☐ White (F)

BLACK
☐ Black/Afro-American (A)

ASIAN
☐ Chinese/Chinese-American (J)
☐ Japanese/Japanese-American (B)
☐ Filipino/Filipino (L)
☐ Pakistani/East Indian (R)
☐ Other Asian (H)

AMERICAN INDIAN
☐ American Indian (G)

HISPANIC
☐ Mexican/Mexican-American/Chicano (E)
☐ Latin-American/Latino (S)
☐ Other Spanish/Spanish-American (M)

OTHER
☐ Other Non-White (D)

WHEN COMPLETE SEND TO ACCOUNTING OFFICE

DEPARTMENTS COMPLETE ALL BUT EMPLOYEE NUMBER.

| LOC | EMPLOYEE NUMBER | EMPLOYEE RATE | EMPLOYEE INT | EMPLOYEE DATE |
|---|---|---|---|---|
| | | | | 23 |

L, S, & C, DPC → 1 2 6 11 12 17 18 19 20
FROM ENDICOTT → 1 2 7 12 13 18 19 20

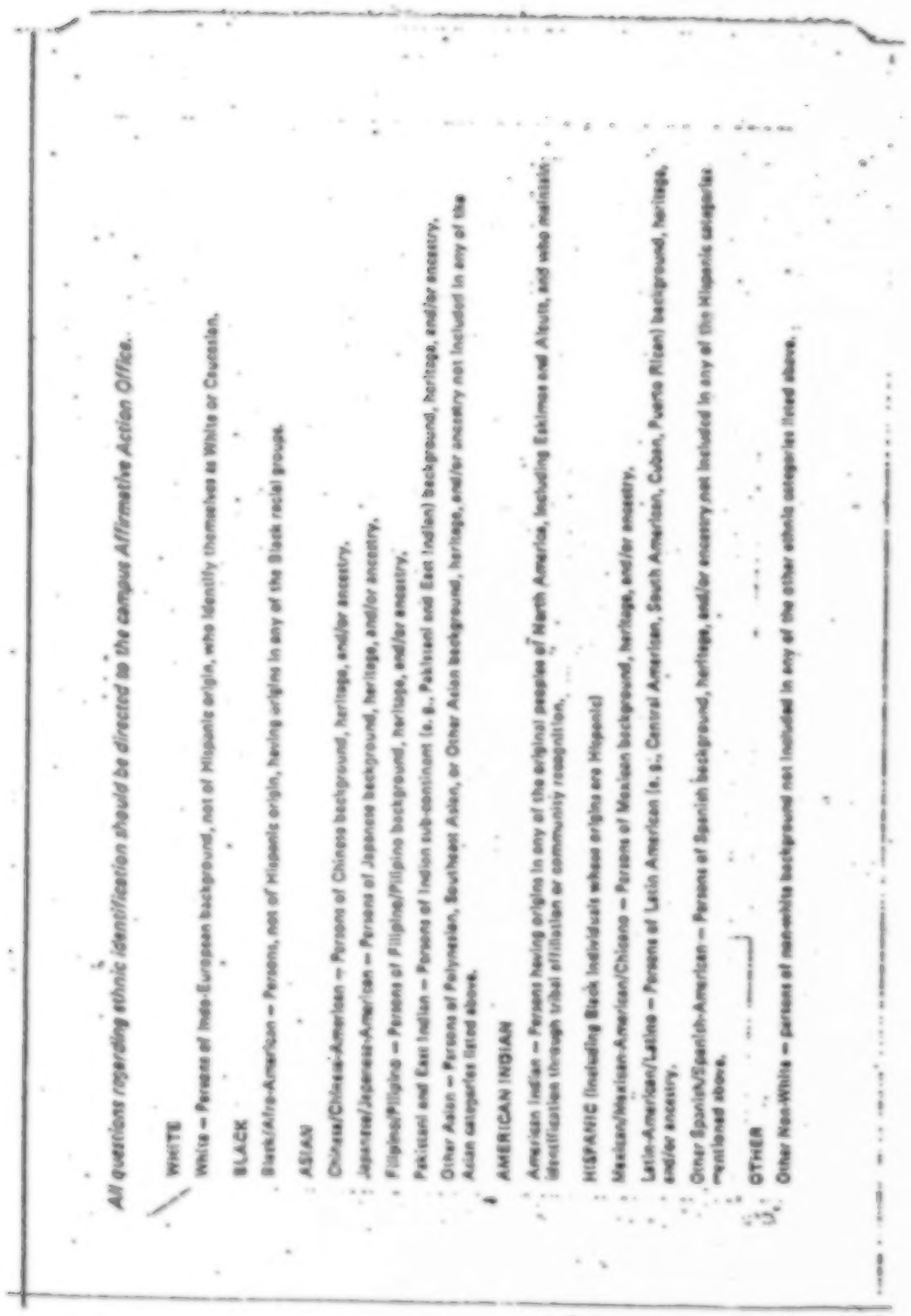
PURPOSE
To assure full compliance with Federal and State Equal Opportunity and Affirmative Action requirements, the University is obliged to collect and maintain data on the ethnic composition of the workforce. These data will be utilized for compliance and statistical purposes only and must be as accurate as possible. No copy of this form shall be retained in departmental or campus files, nor shall any notation of ethnic identity be made on any individual's personnel record.

RESPONSIBILITIES
It is the responsibility of the supervisor to submit an Ethnic Identity Form for each employee. The employee may choose to complete the form himself/herself, or jointly with the supervisor. The supervisor shall be responsible for assuring that the ethnic identity transmittal is completed for each employee, either by adopting the identification submitted by the employee or by using his/her best judgment in assigning an ethnic identity to the employee (by visual observation or other factors, or, if necessary, in consultation with the Personnel Office. The supervisor shall inform the employee of the ethnic identity he/she has assigned.

EMPLOYEE NAME (Last, First, Middle Initial)

ORGANIZATIONAL UNIT CODE

RETENTION: DESTROY AFTER KEYPUNCHING


All questions regarding ethnic identification should be directed to the campus Affirmative Action Office.

WHITE
White – Persons of Indo-European background, not of Hispanic origin, who identify themselves as White or Caucasian.

BLACK
Black/Afro-American – Persons, not of Hispanic origin, having origins in any of the Black racial groups.

ASIAN
Chinese/Chinese-American – Persons of Chinese background, heritage, and/or ancestry.
Japanese/Japanese-American – Persons of Japanese background, heritage, and/or ancestry.
Filipino/Filipino – Persons of Filipino/Filipino background, heritage, and/or ancestry.
Pakistani and East Indian – Persons of Indian sub-continent (e. g., Pakistani and East Indian) background, heritage, and/or ancestry.
Other Asian – Persons of Polynesian, Southeast Asian, or Other Asian background, heritage, and/or ancestry not included in any of the Asian categories listed above.

AMERICAN INDIAN
American Indian – Persons having origins in any of the original peoples of North America, including Eskimos and Aleuts, and who maintain identification through tribal affiliation or community recognition.

HISPANIC (including Black individuals whose origins are Hispanic)
Mexican/Mexican-American/Chicano – Persons of Mexican background, heritage, and/or ancestry.
Latin-American/Latino – Persons of Latin American (e. g., Central American, South American, Cuban, Puerto Rican) background, heritage, and/or ancestry.
Other Spanish/Spanish-American – Persons of Spanish background, heritage, and/or ancestry not included in any of the Hispanic categories mentioned above.

OTHER ... _____
Other Non-White – persons of non-white background not included in any of the other ethnic categories listed above.

BEST COPY AVAILABLE

## SOUNDING BOARD

### ACADEMIC STANDARDS IN MEDICAL SCHOOLS

Since the consumer is particularly blind in purchasing medical care, and his vital interests are often at stake, those who are in a position to screen for aptitude and competence in medicine have a grave moral responsibility. In accepting this responsibility medical faculties have always taken into account qualities of character and motivation as well as scientific ability and knowledge. In addition, in recent years we have finally begun also to take into account long ignored social needs. But no one of these sets of qualifications can compensate for a gross deficiency in another. In particular, as the practice of medicine broadens its scientific base, it increasingly requires a reasonable level of competence in science, at least as long as the M.D. degree leads to an unlimited license to make life-and-death judgments. In this connection preclinical courses serve not only to provide a scientific background for practice but also to screen students for the ability to reason scientifically.

This screening has become more difficult in recent years. A variety of considerations have led medical schools to engage in innovations in admissions, curriculum, grading and criteria for promotion. Some faculties, no longer confident of their ability to maintain adequate minimal standards, have set an external standard by requiring candidates for the diploma to have passed Parts I and II of the National Board Examinations. But for schools that have aimed at leadership this minimal national standard is an extraordinarily low one. Moreover, it has been further lowered in recent years: National Board grades are normalized for each year's population, and so the absolute norm for passing is necessarily lowered by any nationwide increase in admission of students with substandard academic qualifications.

It would be a rare person today who would question the value of stretching the criteria for admission, and of trying to make up for earlier educational disadvantages, to help disadvantaged groups. But how far faculties should also stretch the criteria for passing students is another matter. If a board licensing airline pilots allowed extraneous considerations to interfere with objectivity it would be considered criminal. The temptation to award medical diplomas on a charitable basis raises the same question, even though the consequences of fatal error in the two professions are not equally visible and dramatic.

Many faculty members have wondered whether the stretching of standards in their schools in recent years has not exceeded what is reasonable. The problem is illustrated by a distinguished school that recently waived its National Board requirement and awarded a diploma to a student who had been unable to pass Part I in five tries. The award of this degree was virtually inevitable, after five years of investment by the school and the student. But we must look at the erosion of internal standards, and the postponement of decision, that allowed this situation to develop.

Medical faculties can derive deep satisfaction from their success in recruiting and helping many able students from groups that were formerly excluded. But it has also become apparent that patience and sympathy cannot overcome the inability of some students to handle the material. It is cruel to admit students who have a very low probability of measuring up to reasonable standards. It is even crueller to abandon those standards and allow the trusting patients to pay for our irresponsibility.

Considerations of tact, and guilt over our history of enormous racial injustice, have made it difficult to face the problem. But there are dangers in a policy that fails to evaluate the results of our recent experiments objectively. If the public is given a romanticized view we can expect demands for the extension of quotas, rather than demands for strengthening the quality of the product. Thus, recent statements by Senator Edward M. Kennedy (*New York Times* letters to the Editor, March 21 and 31), calling attention to the unequal supply of medical students from different socioeconomic groups, could well be the first step toward quotas for admission from these groups.

It seems time for medical faculties to ask whether we have been properly balancing our obligation to promote social justice with our primary obligation to protect the public interest, in an area in which the public cannot protect itself.

[illegible] Medical School
Boston, MA 02115

BERNARD D. DAVIS, M.D.

# SOUNDING BOARD

## MINORITY ADMISSIONS — A REALISTIC ASSESSMENT

THE minority student comes from a heritage that continues to be plagued by poverty and its attendant millstones of poor education and lack of equal opportunity arising from racial prejudice. No man of good will questions the moral duty, social propriety and desirability of making every effort to right these wrongs and eventually to rid society of one of its greatest social ills. Such efforts must in every instance be morally correct and based upon sound judgment if lasting progress is to be made. Good intentions fired solely by a sense of guilt are neither prudent, nor substantial, nor lasting.

Few will question the view that greater and more lasting progress toward the social and economic liberation of minorities must be based on the development of a critical mass of more highly educated persons. It follows, then, that minority students must gain access to universities and their graduate and professional schools if they are to take their place in the professional, economic, and political life of this country. Traditionally, admission to a university has been based on the fulfillment of carefully selected prerequisites at a level of performance that long experience has shown to be essential for optimal education of the student. It is at this point that we come to reap the bitter harvest sown by our forefathers and cultivated by us—the marginally educated minority student. The vicious circle presents itself as follows: a paucity of university-trained minority professionals exists in the face of an appreciable number of minority students who are poorly educated or undereducated and often unable to gain entrance to a university. All agree that the circle must be broken, but methods to accomplish this end differ widely and are the basis for considerable controversy.

The strengths and weaknesses of two different approaches to this problem merit analysis. The first is based on a lowering of academic standards for admission. A positive feature of this approach is that it immediately breaks the vicious circle and a quantum of minority students gain entrance into academic institutions that were hitherto inaccessible to them. However, this seemingly facile solution is encumbered by numerous difficulties

that soon emphasize its shallowness and artificiality. Since the minority students have been admitted on a standard clearly different from that of other students, the university tacitly admits their second-class status, thus perpetuating precisely that which it strives to eradicate. Secondly, if academic standards are maintained at their previous higher level, some minority students will find themselves in an environment in which they are academically outclassed — in which, despite all their honest efforts and hard work, they are doomed to either a very tenuous survival or failure. Often, their only hope of survival depends upon subsequent lowering of academic performance standards, a deplorable practice not only because it is the most despicable facet of the double standard, but also because it makes a mockery of the educational process. The emotional disturbances, feelings of inferiority, and losses of self-image suffered by such students must rest on the consciences of those who used the double standard for admission and retention and not those of the faculty who treated them as equals in the academic arena.

One must ask oneself whether a minority student who remains in school in spite of his educational deficiencies and because of lowered academic standards can practice professionally and compete successfully with his minority and non-minority colleagues who could meet the rigorous academic performance demanded of them. In view of the national exposure given the standards employed by some professional schools for admission and retention of minority students, especially law and medicine, every effort must be made to prevent the development of a public belief that minority professionals may be less capable than their majority counterparts. Such a public response is apt to develop when there is no assurance that the admission and academic evaluation of such students were objective and comparable to that of non-minority students. One must protect the numerous well qualified minority persons who are highly capable in the discharge of their professional duties and who are the only hope for the long-term solution of the minority problem. Also, the public, which ultimately suffers or benefits from the qualifications and capabilities of the professionals on whom it must depend, must be able to consult and retain them without concern about their competence.

The basic fallacy behind university educational programs employing the double standard is emphasized by the fact that daily, and often hourly, some academic rule must be modified or disregarded, or an academic standard lowered, to preserve the program and give it some semblance of success. In short, the viability of such programs is artificially maintained and, more often than not, at the cost of academic quality.

The double standard, it should be clear, cannot be condoned. Fortunately, there is an alternative approach to aid the academically disadvantaged minority student, one not as "striking" as that of the double standard, but based on the sound premise that an academically disadvantaged student must be re-educated until the necessary standards are met for admission to and successful academic performance in a university. Such programs are admittedly slow and costly, but then it is naive and unreasonable to expect that the injustice of 300 years can be rectified in a year or two by the fiat of lowering academic standards. A number of schools have "affirmative-action programs" that have been truly affirmative and have taken several approaches toward preparing the disadvantaged student for university training. In one type of program, promising minority students are sought out and identified in secondary school or early in college, and counseled, supported and encouraged in an effort to help them obtain the optimum from their educational experience so that they reach educational parity with non-minority students. Other programs attempt to re-educate minority applicants to professional school after they have been admitted but before they begin their studies, usually during the summer months. This approach begins after a careful analysis of a student's specific academic weaknesses, and depending on their extent and severity, appropriate educational experiences are recommended and in many cases required. When their educational deficits have been corrected, they are allowed to begin their professional studies and are then capable of meeting the same requirements for academic performance expected of other students. A limitation of the latter program is that the span of the summer months may be insufficient to prepare the student adequately. Both types of preparatory programs have proved to be successful, although the former appears to be more so because the educational background of the student has generally been much stronger.

The programs outlined above place disadvantaged students in an environment where they can compete successfully, and are thus more prudent than the "sink-or-swim" approach, which is a callous repudiation of responsibility by the administration and faculty of an educational institution. Programs such as the one I have described are not in vogue with the "rapid" results demanded by those charged with implementation of civil-rights legislation. It is apparently of little importance to them that educational programs employing the double standard engender development of a lower-quality professional. No degree of "enlightened" argument can realistically support the admission and graduation of incompetent professionals, minority or otherwise. In view of the number of minority students who have suffered a continuous string of academic setbacks, and the growing lack of support from faculty for politically expedient solutions, future admissions must be based on the more sensible policy of admitting truly qualified minority students or admission contingent on their successful re-education.

The integrity of the university is not maintained when it applies makeshift short-term solutions to a problem as morally important and emotionally tinged as this one. The academic community must be responsive to social issues, but it must do so in a manner that ensures long-term gains — to do less is not in keeping with the ways of educated men dedicated to the ideas of the high worth of the individual and universal human progress.

University of Kansas
Medical Center
Kansas City, KS 66103 DANTE G. SCARPELLI, M.D., PH.D.

UNITED STATES NAVAL ACADEMY FOUNDATION
INCORPORATED
48 MARYLAND AVENUE ANNAPOLIS MARYLAND

10 June 1977

JUN 1 3 1977

RADM William C. Mott, USN (Ret.)
National Legal Center for the Public Interest
Suite 810
1101 17th Street, N.W.
Washington, D.C. 20036

Dear Bill:

Bob McIlvaine called to inform me that he had called you so that is taken care of.

As I told you, only the profiles of the last five years have carried the information on the number of blacks and other ethnic candidates who entered the Naval Academy. When I get this years profile, probably in August, I'll send a copy which will give you a period of six years. The data follows:

| Class | Number Admitted | Blacks | % Blacks | Total Ethnic | % |
|---|---|---|---|---|---|
| 1976 | 1334 | 73 | 5.5% | 94 | 7.0% |
| 1977 | 1438 | 112 | 7.8% | 146 | 10.2% |
| 1978 | 1513 | 90 | 5.9% | 178 | 11.8% |
| 1979 | 1327 | 55 | 4.1% | 151 | 11.4% |
| 1980 | 1299 | 66 | 5.1% | 156 | 12.0% |

Note: Ethnic backgrounds include American Indian, Spanish American/Mexican, Oriental American, Puerto Rican.

Hope this will be of some assistance to you.

All the best,

Sincerely,

E. Eliot

Elliott Loughlin
Rear Admiral, USN (Ret.)
Executive Director

EL:rc

REAR ADMIRAL ELLIOTT LOUGHLIN, USN (RET.) EXECUTIVE DIRECTOR (301) OFFICE 267-6031, 6032 · RES. 268-5893